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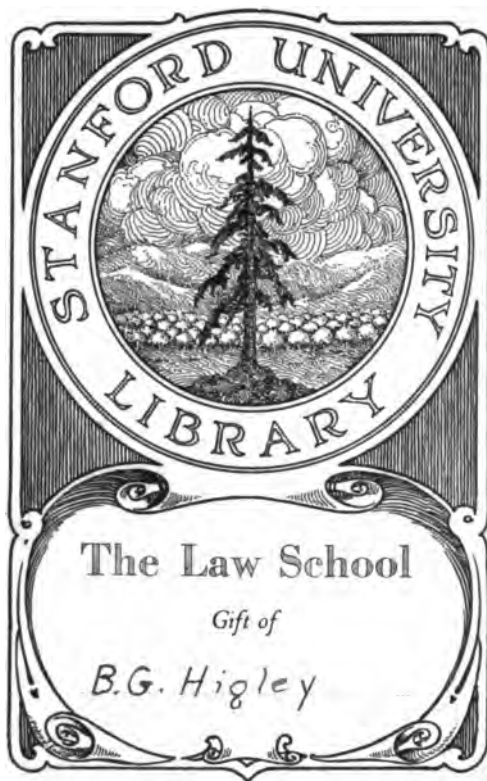
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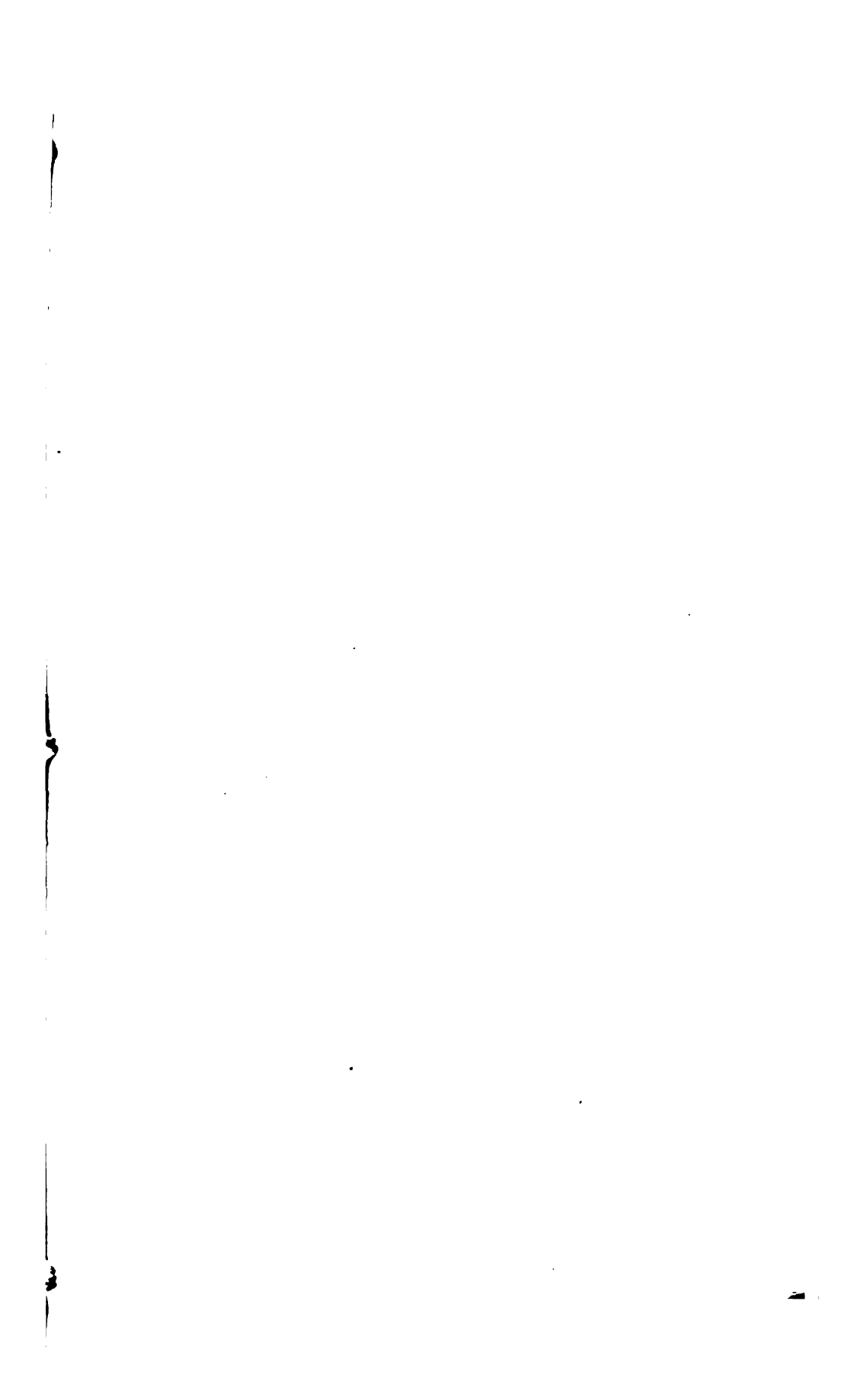
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THE

E. D. Arnold

PRACTICE

IN

SPECIAL PROCEEDINGS

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK,

UNDER THE

CODE OF CIVIL PROCEDURE AND STATUTES, WITH FORMS.

BY

J. Arnold
J. NEWTON FIERO,

Of the Ulster County Bar.

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PREFACE.

The lapse of more than twenty years since the appearance of a treatise on the subjects discussed in this volume seems to render any explanation of the motives for this publication entirely unnecessary.

In addition to that fact, however, it may be noted that by the enactment of chapters 14 to 29 of the Code, taking effect in 1880, many and radical changes were made in the conduct of special proceedings, then for the first time codified. In the mean time, too, many of the remedies like *certiorari*, *mandamus*, general assignments and proceedings to acquire lands for railroad purposes have gradually grown in importance, and the body of authorities on all the subjects treated is nearly, if not quite, twice as great as at the time of the issue of the last text-book in which they are considered.

As a matter of convenience to the profession, and to avoid examination of a separate volume, or reference to other portions of this volume, the Code or statute on each subject is followed by citation of authorities, and forms are given in the body of the text, enabling the practitioner to examine the legislative enactment as construed by the courts, and to consult the precedents connected with both, with the least possible labor.

In case criticism should be made that the course of procedure as given in many instances is not orderly or logical, it can only be said that the arrangement of the Code and statutes in that respect has been strictly followed as the only safe method, even though it may have resulted in stating the practice on appeal in a matter, before providing for the commencement of the proceeding.

The plan of the work includes all the special proceedings provided for by the Code of Civil Procedure, §§ 1991 to 2471 inclusive, and in addition treats general assignments, reference of claims against estates, proceedings for sale of real estate of religious corporations, and pro-

ceedings to acquire title to lands for railroad purposes, as provided for by statutory enactment.

The classification made by the Code reduces very largely the number of what were at one time classed as special proceedings, excluding partition, foreclosure, mechanics' liens, and numerous other subjects heretofore treated as such, and now regarded as actions.

By reason of that fact, and by condensing the text so far as was possible without affecting clearness and accuracy, and by giving full pages of matter, the work has been confined to a single volume without sacrificing any substantial benefits, although the authorities cited include all the State Reports up to 44 Hun, 8 State Rep., and 104 N. Y. R.

If, as has been said, every lawyer owes it to his profession to write a book, my duty in that respect is discharged, and it remains for the profession to determine whether its merits constitute a sufficient reason for its existence. The fact that it was written during hours snatched from active practice is no excuse for shortcomings, and if it does not meet the demands of the profession, it will richly deserve that condemnation which it will be certain to receive at their hands. While if it prove of service, I need not bespeak a hearty recognition of that fact from my brethren of the profession, for whose benefit it was prepared and to whose criticism it is submitted.

KINGSTON, *October 1, 1887.*

J NEWTON FIERO.

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CHAPTER I.

PROVISIONS APPLICABLE TO TWO OR MORE STATE WRITS.

CODE OF CIVIL PROCEDURE. § 1991. The writ of *habeas corpus*, to bring up a person to testify, or to answer; the writ of *habeas corpus*, and the writ of *certiorari*, to inquire into the cause of detention; the writ of *mandamus*; the writ of prohibition; the writ of assessment of damages, which is substituted for the writ heretofore known as the writ of *ad quod damnum*; and the writ of *certiorari*, to review the determination of an inferior tribunal, which may be called the writ of review, shall hereafter be styled, collectively, State writs.

The title of the writs enumerated in this chapter is new under the Code of Civil Procedure, but the writs are all of common-law origin — the writ of *habeas corpus*, to bring up a person to testify or answer, serves a convenient purpose in practice, which is fully described in its title; its origin and history have no especial interest, and its use is much restricted.

The writ of *habeas corpus* and the ancillary writ of *certiorari*, which must not be confounded with the ordinary writ of review bearing that title, take a leading place in the history of the common law. The *habeas corpus* is one of the oldest of the common-law writs, traces of it being found as early as 1374. The writ of *habeas corpus* is an ancient and legal writ. Cro. Car. 466. In Bacon's Abridgment, vol. 3, p. 42, and Comyn's Digest, vol. 4, p. 336, the writ of *habeas corpus* is said to be awarded to have the body and cause of one imprisoned removed to some superior jurisdiction which hath the authority to examine the legality of the commitment. It went under various names, as the *habeas corpus ad subjiciendum*, which issued in criminal cases; the *habeas corpus ad faciendum and recipiendum*, which issued only in civil cases; the *habeas corpus ad respondendum*, where the person was confined in jail for a cause of action accruing in an inferior court, and a third person had a cause of action against him; and the *habeas corpus ad deliberandum and recipiendum*, which lay to remove the person to the proper place, or the county where he had committed some criminal offense.

The writ as it now exists dates back to the time of Charles II. One of the notable instances of its use was the case of John Wilkes,

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in 1763, he having been arrested for publishing a treasonable and seditious newspaper. The writ was sued out on the ground that no name was inserted in the warrant issued for his arrest.

The writ was issued in this State as early as 1787, on the ground that the commitment did not specify the offense charged.

The statute of Charles II was followed in the first statute enacted in this State in 1737; this was amended in 1818, and again in 1828. The subsequent revisions have been slight, the Code of Civil Procedure having adopted substantially the previous statutes.

The Constitution of the United States provides (art. 1, § 9, clause 2): "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety requires it," thus recognizing the existence of the remedy; and in 1789, Congress passed an act defining the jurisdiction of the Federal courts in issuing the writ.

The writ of *certiorari*, to inquire into the cause of the detention, is in aid of the writ of *habeas corpus*, and provided for by the same article of the Code of Civil Procedure.

The writ of *mandamus* seems originally to have been a *mandate* from the sovereign directing the performance of a specific act by a subject. By Comyn's Digest, vol. 5, p. 21, *mandamus* is defined as a prerogative writ introduced to prevent disorder from a failure of justice and defect of police, and ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one; while Bacon's Abridgment, vol. 4, p. 497, defines *mandamus* as a writ commanding execution of an act where otherwise justice would be obstructed or the king's charter neglected, issuing regularly in cases relating only to the public and the government, and is, therefore, termed a prerogative writ. It is defined by Blackstone as "In general a command issuing in the king's name from the Court of the King's Bench and directed to any person, corporation or inferior court of jurisdiction within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office or duty, and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right or justice."

Lord Mansfield said: "A *mandamus* is a prerogative writ to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court. There is no doubt that where a party who has a right has no other specific legal remedy, the court will assist him by issuing this writ." *Rex v. Asken*, Burr. 486.

The Code of Civil Procedure has defined fully the practice on this writ, which theretofore was regulated partially by the Common-Law rules, partially by the Revised Statutes, and in part by the Code of Procedure. The writ of *mandamus* is a legal writ, and the forms of procedure and the rules which governed in the Court of Chancery have no application to it. *People, ex rel., v. French*, 3 Civ. Pro. 180.

Bacon's Abridgment, vol. 5, p. 446, says of the writ of prohibition, that its object is the preservation of the right of the king's crown and courts, and the ease and quiet of the subject; its object is to keep the several courts within the limits and bounds of their jurisdictions prescribed by the laws and statutes of the realm. The writ of prohibition, while but rarely used, was declared by Judge Selden in *Quimbo Appo v. The People*, 20 N. Y. 531, "an ancient and valuable writ, and one, the use of which in all proper cases should be upheld and encouraged." It was employed in England from the earliest times, being issued only from the King's Bench, and mainly ran to the ecclesiastical courts. It lies to inferior tribunals to restrain judicial but not ministerial acts. It has been materially modified by the Code, and the practice under it simplified and defined.

The writ of *ad quod damnum*, or assessment of damages, was a writ used to inquire whether a grant intended to be made by the king would be to the damage of him or others. Comyn, vol. 1, p. 398. There is in this State but a single reported case previous to the Code of Civil Procedure; by this Code the details of the practice were largely modified.

A *certiorari* is an original writ issuing out of Chancery or the King's Bench, directed in the king's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him, or such justices as he shall assign to hear the cause. Bacon's Abridgment, title *Certiorari*.

The Courts of Chancery and King's Bench might award a *certiorari* to remove a proceeding from any inferior court, whether of an ancient or newly-created jurisdiction, unless the statute or charter which created them exempted them from such jurisdiction (Bacon's Abridgment, vol. 1, p. 561); or as said by Comyn (Digest, vol. 2, p. 185), the writ of *certiorari* was an original writ issuing out of Chancery or King's Bench, when the king would be certified of any record in any other court of record.

At common law this writ removed the proceeding to the court

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issuing the writ, which then took cognizance of the matter as an original proceeding, and heard and determined it as such. With us, however, it is a writ of review of the determination of an inferior board or tribunal. Its functions have been narrowed from time to time by provisions for review of determinations of the different courts by appeal, and by the Code of Civil Procedure it is only made applicable to cases where no appeal will lie.

All these writs ran in the king's name, and now run in the name of the people, whence the title given by the Code of "State writs." As will be observed, the scope of these writs has been very greatly modified from time to time, and the Code defines their nature and limits the circumstances under which they may issue.

§ 1992. A State writ must be issued under the seal of the court by which it is awarded. Where it is allowed by a judge out of court, and is returnable before a court of record, it must be issued under the seal of the court before which it is returnable. Where it is returnable before a judge out of court, or before a body or tribunal other than a court of record, it must be issued under the seal of the Supreme Court. Where the seal of the Supreme Court is to be used, as prescribed in this section, it may be the seal of the county wherein the writ is awarded, or wherein it is returnable.

This is a substantial re-enactment of 2 R. S. 574, § 74, except that certain writs are there enumerated by name.

The writs and return thereto were required to be sealed under the earlier practice. See as to *mandamus*, 4 Bacon's Abridgment, 498; as to return to *certiorari* under seal of tribunal to which it is directed, 1 Id. 571.

A writ of *certiorari* to review the determination of an inferior tribunal is a State writ, which by the express provision of the statute is required to be issued under the seal of the court before which it is returnable. A writ is not, however, void by reason of this defect, which may be cured by amendment. *People, ex rel., v. Assessors of Town of Herkimer*, 6 Civ. Pro. 297.

This provision is tantamount to the statute making the seal of the county the seal of the Supreme Court. In practice the writ will ordinarily issue from the Supreme Court or superior city court, except in case of *habeas corpus*, where the writ is frequently allowed by county judges or other judicial officers having jurisdiction, but in those cases it is ordinarily returnable before the judge out of court.

§ 1993. Where a State writ is required, in an action or special proceeding, civil or criminal, to which the people are a party, or in which they are interested, it may be awarded upon the application of the attorney-general, or of the district attorney having charge of the action or special proceeding; and the indorsement of the allowance thereof must state, that it was issued upon such an application.

It is said in *People v. Mason*, 9 Wend 505, referring to 3 R. S. 77, which is similar in language, that this is the proper remedy given the public prosecutor where property is burglariously stolen in one county and the offender is apprehended and committed for such offense to the jail of another county if he is indicted in the county where the property was stolen, and that the circumstances under which it is necessary or proper to issue the writ are not specified by the statute but are necessarily left in the discretion of the court. On production of a writ duly indorsed it is the duty of the sheriff to deliver the prisoner.

The form of indorsement as required by this section and to conform to the terms of section 1996, may be as follows :

“ The within writ allowed this 31st day of March, 1886, on application of J. N. Vanderlyn, district attorney of Ulster county.

(Signed)

WILLIAM S. KENYON,

County Judge.”

Where the people have an interest the attorney-general is the proper officer to set it in effective operation on their behalf. So held on *mandamus* to compel railroad company to perform their duties as common carriers. *People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 543.

§ 1994. A State writ must be issued in behalf of the people of the State; but where it is awarded upon the application of a private person, it must show that it was issued upon the relation of that person. The officer, or other person, against whom the writ is issued shall be styled the defendant therein.

When the writ is issued on behalf of the people, and on their application, the papers after the petition will be entitled “ The People of the State of New York against The Board of Supervisors of the County of Ulster.” On *mandamus* so entitled brought by the attorney-general, the affidavit was entitled in the proceeding. In case where a private person is relator, the title is “ The People, *ex rel.* Richard Stokes, against George Young, Sheriff ;” the party suing out the writ is termed the relator.

§ 1995. The parties to a special proceeding, instituted by State writ, may appear by attorney, with like effect as in an action brought in the Supreme Court; but a return to such a writ must be made under the hand of the defendant, except in a case where it is otherwise specially prescribed by law, or where the court or judge, for good cause shown by affidavit, otherwise directs. Where the attorney-general or the district attorney does not appear for the people, the attorney for the relator is deemed also the attorney for the people.

§ 1996. The presiding judge of a court, by which a State writ is awarded, or the judge who allows such a writ out of court, as the case may be, must sign an allowance thereof indorsed thereupon, stating the date of the allowance.

6 PROVISIONS APPLICABLE TO TWO OR MORE STATE WRITS.

The writ at common law must have been signed before sealing 2 Salkeld, 434. By statute of Charles II, the writ of *habeas corpus* must be indorsed and if not signed by the judge, need not be obeyed. Cowper, 672.

The form of indorsement may be :

“The within writ allowed this 31st day of March, 1886.

(Signed)

WILLIAM S. KENYON,

County Judge.”

This indorsement, which is usually accompanied by a formal order that the writ issue, is the authority for signature of the clerk and affixing the seal.

§ 1997. The final determination of the rights of the parties to a special proceeding instituted by State writ is styled a final order. The provisions of this act, relating to amendments, motions, and intermediate orders, in an action, are applicable to similar acts in such a special proceeding; except where special provision is otherwise made therein, or where the proceeding is repugnant to the object of the State writ, or the mode of procedure thereunder.

§ 1998. Except where special provision is otherwise made in this act, a State writ may be made returnable forthwith, or on a future day certain, as the case requires.

The provisions as to time of return to the writ of *mandamus* will be found at section 2072; those as to return to writ of *certiorari* at section 2132; those as to writ of prohibition at section 2095. The rule in King's Bench as to *certiorari* was that it was returnable the first day of the next term. Comyn's Digest, vol. 2, p. 192.

§ 1999. Except where special provision is otherwise made in this act, a State writ must be personally served, in like manner as a summons issued out of the Supreme Court; and each provision of this act, relating to the personal service of such a summons upon a defendant, applies to the service of a State writ.

The service of writs as regulated by this section must conform to section 426.

§ 2000. A writ of *habeas corpus* can be served only by an elector of the State. Where the prisoner is in custody of a sheriff, coroner, constable, or marshal, the service is not complete, unless the person serving the writ tenders to the officer the fees allowed by law for bringing up the prisoner, and delivers to him an undertaking, with at least one surety, in a sum specified therein, to the effect, that the surety will pay the charges of carrying back the prisoner, if he shall be remanded; and that the prisoner will not escape by the way, either in going to, remaining at, or returning from the place to which he is to be taken. The sum so specified must be, at least, twice the sum for which the prisoner is detained, if he is detained for a specific sum of money; if not, it must be one thousand dollars.

The following is a precedent for the undertaking required.

WHEREAS a writ of *habeas corpus* has been issued by Hon. William S. Kenyon, county judge of Ulster county, by which George Young, sheriff of Ulster county, is commanded to have the body of Richard

Stokes before him at his chambers in the city of Kingston in said county on the 2nd day of April, 1886, at ten o'clock in the forenoon, to do and receive what shall be then and there considered, concerning said Stokes: Now, therefore, I, Lewis B. Stevens, banker of the town of Wawarsing in the county of Ulster, undertake in the sum of \$1,000 to pay to said George Young all charges of carrying back such prisoner, if he shall be remanded, and that such prisoner shall not escape by the way either in going to, remaining at, or returning from the place to which he is to be taken.

LEWIS B. STEVENS. [L. S.]

To which should be attached the usual justification and acknowledgment.

§ 2001. A court or a judge, allowing a writ of *habeas corpus*, directed to any person other than a sheriff, coroner, constable, or marshal, may, in its or his discretion, require the applicant, in order to render the service thereof complete, to pay the charges of bringing up the prisoner. In that case, the amount of the charges, not to exceed the fees allowed by law to a sheriff for a similar service, must be specified in the certificate allowing the writ.

The form of indorsement given under section 1996 may be used, adding "and the charges for bringing up said prisoner, three dollars, are directed to be paid by the petitioner as a condition thereof."

§ 2002. The last two sections are not applicable to a case where the writ is allowed upon the application of the attorney-general, or a district attorney.

§ 2003. A writ of *habeas corpus* or of *certiorari*, issued as prescribed in article second or article third of this title, may be served by delivering it to the person to whom it is directed. If he cannot be found, with due diligence, it may be served, by leaving it, at the jail or other place in which the prisoner is confined, with any under officer, or other person of proper age having charge, for the time, of the prisoner, and paying or tendering to him the fees or charges for bringing up the prisoner. If the person, upon whom the writ ought to be served, keeps himself concealed, or refuses admittance to the person attempting to serve it, it may be served by affixing it in a conspicuous place, on the outside, either of his dwelling-house, or of the place where the prisoner is confined. In that case, the service is complete, without tendering the fees or charges for bringing up the prisoner.

This section relates entirely to the use of the writ of *habeas corpus*, and the writ of *certiorari* when used as an ancillary writ to inquire into the cause of detention, and is in aid of personal liberty as secured by *habeas corpus*.

§ 2004. A sheriff, coroner, constable, or marshal, upon whom complete service of a writ of *habeas corpus* is made, as prescribed in this article, must obey and make return to the writ, according to the exigency thereof, whether it is directed to him or not. Any other person, upon whom such a writ is served, having the custody of the individual for whose benefit it was issued, must obey and execute it, according to the command thereof, without requiring any bond, or the payment of any charges, except such as are specified in the certificate allowing the writ.

§ 2005. A person, upon whom a writ of *certiorari*, issued as prescribed in this title, is served, must, in like manner, upon payment or tender of the fees allowed by law for making a return to the writ, and for copying the warrant, or other process or proceeding to be annexed thereto, obey and return the writ, according to the exigency thereof.

§ 2006. Where a writ of *habeas corpus* is returnable on a day certain, the return must be made at the time and place specified therein. Where such a writ is returnable forthwith, at a place within twenty miles of the place of service, the return must be made, and the prisoner must be produced, within twenty-four hours after service; and the like time must be allowed for each additional twenty miles.

By the statute of Charles II, if a *habeas corpus* was served on an officer having the custody of a person, he was bound, in three days after delivery, if within twenty miles, or in ten days if above twenty and under a hundred miles, or in twenty days if above a hundred miles, to return the writ and bring the body according to the command of the writ. Comyn's Digest, vol. 4, p. 331.

§ 2007. For non-payment, upon demand, of the costs awarded by a final order, made in a special proceeding instituted by State writ, except where a peremptory writ of *mandamus* is awarded, after the issuing of an alternative *mandamus*, the person required to pay the same may be punished for a contempt of the court awarding them, or of which the judge awarding them is a member, as if the final order was a final judgment of the court.

The proceedings to punish a contempt of court, other than a criminal contempt, are given under title 3, chapter 17, Code of Civil Procedure (see which title). Where a judgment of a court-martial is brought into the Supreme Court by a writ of *certiorari*, and there reversed, the respondent is personally liable for the costs awarded by the final order and may be adjudged guilty of a contempt if he fail to pay them after a demand therefor has been made. *In re Leary*, 30 Hun, 394.

CHAPTER II.

THE WRIT OF HABEAS CORPUS TO BRING UP A PERSON TO TESTIFY.

§ 2008. A court of record, other than a justice's court of a city, or a judge of such a court, or a justice of the Supreme Court, has power, upon the application of a party to an action or special proceeding, civil or criminal, pending therein, to issue a writ of *habeas corpus*, for the purpose of bringing before the court a prisoner, detained in a jail or prison, within the State, to testify as a witness, in the action or special proceeding, in behalf of the applicant.

This writ is for the convenience of litigants in obtaining testimony of persons under arrest, and its functions are entirely different in

their nature from those of the writ of *habeas corpus* to inquire into the cause of detention of a prisoner. It is in fact an order, granted *ex parte* upon certain proof, directing the sheriff, or other officer in whose custody the prisoner may be, to bring him into court to enable him to be examined as a witness.

The prisoner may be brought up on writ to testify upon his own application for a discharge. *Wattles v. Marsh*, 5 Cow. 176. See *Martin v. Wood*, 7 Wend. 132.

It will be noticed section 2011 limits the application of section 2008.

§ 2009. Such a writ may also be issued by a justice of the Supreme Court, upon the application of a party to a special proceeding, civil or criminal, pending before any officer or body, authorized to examine a witness therein. In a case specified in this section, the writ may also be issued by a judge of a superior city court, a county judge, or a special county judge, residing within the county where the officer resides, before whom, or the court or other body so in, or before which, the special proceeding is pending.

§ 2010. Such a writ may also be issued by a justice of the Supreme Court, upon the application of a party to the action, pending before a justice of the peace, or in a Justice's Court of a city, or a District Court of the city of New York, to bring before the justice or court, to be examined as a witness, a prisoner confined in the jail of the county where the action is to be tried, or an adjoining county. In a case specified in this section, the writ may also be issued by a judge of a superior city court, a county judge, or a special county judge, residing within the county where the justice resides, or the court is located, or the prisoner is confined, as the case may be.

§ 2011. [Amended 1880.] A writ shall not be issued, by virtue of either of the last three sections, to bring up a prisoner sentenced to death. Nor shall it be issued to bring up a prisoner confined under any other sentence for a felony; except where the application is made, in behalf of the people, to bring him up as a witness on the trial of an indictment, and then only by and in the discretion of a justice of the supreme court, or a judge of a superior city court, upon such notice to the district attorney of the county wherein the prisoner was convicted, and upon such terms and conditions, and under such regulations as the judge may prescribe.

§ 2012. An application for a writ, made as prescribed in either of the foregoing sections of this article, must be verified by affidavit, and must state:

1. The title and nature of the action or special proceeding, in regard to which the testimony of the prisoner is desired; and the court, or body, in or before which, or the officer before whom, it is pending.

2. That the testimony of the prisoner is material and necessary to the applicant, on the trial of the action, or the hearing of the special proceeding, as he is advised by counsel and verily believes.

3. The place of confinement of the prisoner.

4. Whether the prisoner is or is not confined under a sentence for a felony.

But where the attorney-general or district attorney makes the application, he need not swear to the advice of counsel.

The following precedents show the form for the petition and writ:

To the County Judge of Onondaga county :

The petition of Frederick Lasher respectfully shows that he is defendant in an action in the Supreme Court in the county of Onondaga, in which Charles Randall is plaintiff. That his testimony as a witness is material and necessary on the trial of said action, as he is advised by his counsel, John Wilkinson, and verily believes. That your petitioner is confined in the Onondaga county jail, under execution against his body in a civil action in which one Ambrose Wattles was plaintiff, and your petitioner defendant. Your petitioner further shows that the action in which said Randall is plaintiff, is noticed for trial at a Circuit Court to be held at the court-house in the city of Syracuse, on the 20th day of April, 1887, and that this application is made in good faith to enable your petitioner to attend such trial as a witness.

Wherefore, your petitioner prays that a writ of *habeas corpus* to testify issue, commanding the sheriff of the county of Onondaga to have your petitioner before said Circuit Court on said 20th day of April, 1887, and such other days to which said cause shall be adjourned to enable him to testify in said action.

FREDERICK LASHER.

(Add verification as to pleading.)

The People of the State of New York, ex rel. Frederick Lasher, to the Sheriff of the County of Onondaga, greeting :

We command you that you have the body of Frederick Lasher detained in the county jail of the county of Onondaga, before our Circuit Court at a term thereof to be held at the court-house in the city of Syracuse on the 20th day of April, 1887, at the opening of the court on that day and on such other days during said term to which the cause entitled Charles Randall against Frederick Lasher shall be adjourned, in your custody, under safe and secure conduct, to testify as a witness in said action.

And immediately after the said Frederick Lasher shall have testified in said action, that then you return him to the said county jail under safe conduct and have you then there this writ.

Witness, Hon. Joshua Forman, county judge of Onondaga [L. s.] county, at the court-house in the city of Syracuse this 15th day of April, 1887.

J. WILKINSON,

Attorney for Petitioner.

A. BREEZE,

Clerk.

The writ should be indorsed "Granted this 15th day of April, 1887, J. Forman, county judge of Onondaga county," as provided by section 1996, and must also be accompanied on delivery to the sheriff by the bond provided for by section 2000.

The form of writ above given is adapted from *Wattles v. Marsh*, 5 Cow. 176, and it is there held that a sheriff is protected by the writ if it was issued by an officer of competent jurisdiction, and is not void on its face, even if issued erroneously. There being no defect of jurisdiction in the officer, it is a justification to the sheriff.

The writ issued in that case was held good despite irregularities which were not of a substantial character.

A like rule was held in *Wiles v. Brown*, 3 Barb. 37, where a sheriff was protected in obeying a discharge granted on *habeas corpus* by a Supreme Court commissioner, though it was an erroneous exercise of power.

§ 2013. The return to a writ, issued as prescribed in this article, must state for what cause the prisoner is held; and if it appears therefrom that he is held by virtue of a mandate in a civil action or special proceeding, or by virtue of a commitment upon a criminal charge, he must, after having testified, be remanded and again committed to the prison from which he was taken.

Precedent for Return by Sheriff.

The return of Willard Marsh, sheriff of Onondaga county, to the writ of *habeas corpus* commanding him to bring up the body of Frederick Lasher to testify at a Circuit Court to be held at the court-house in Syracuse on the 20th day of April, 1887, shows: In obedience to said writ I certify that the said Frederick Lasher was heretofore committed to the county jail of said county, and is now held by virtue of an execution against his body in favor of one Ambrose Wattles.

All of which I hereto certify and have here the body of said Frederick Lasher, as by said writ commanded.

Dated April 20, 1887.

WILLARD MARSH,
Sheriff.

§ 2014. Any officer to whom a writ, issued as prescribed in this article, is delivered, must obey the same, according to the exigency thereof, and make a return thereto accordingly. If he refuses or neglects so to do, he forfeits, to the people, if the writ was issued upon the application of the attorney-general or a district attorney, or, in any other case, to the party on whose application the writ was issued, the sum of five hundred dollars. But where the prisoner is confined under a sentence to death, a return to that effect is a sufficient obedience to the writ, without producing him.

Where a sheriff, having a prisoner in custody for contempt, receives a *habeas* to produce him to testify at an office in the place where the jail is situate, *held*, that he is not authorized to permit the prisoner to go to any other place than such office, or to remain with him there longer than the magistrate himself stayed, and that when the latter left his office for the night, it was the sheriff's duty to take his prisoner back to jail and return with him in the morning, if the officer required his attendance from day to day. *People v. Stone*, 10 Paige, 606. But he is not bound to keep the prisoner always in sight, and if the prisoner go about for a short time on his own business, it is not an escape. *Hussam v. Griffin*, 18 Johns. 48. The last section cited is a re-enactment of section 20, 2 R. S. 562 (2 Edmunds' Ed.), 582, with the addition of the last sentence providing for the case of a capital offense.

CHAPTER III.

THE WRIT OF HABEAS CORPUS AND THE WRIT OF CERTIORARI TO INQUIRE INTO THE CAUSE OF DETENTION.

This chapter revises and codifies the practice on the writ of *habeas corpus*, but, as is said by the codifiers, makes few changes, for the reason that the original provisions of the Revised Statutes were modeled upon Livingston's Criminal Code for Louisiana, which has been regarded as a masterpiece of its kind, following closely as it does the Code Napoleon.

§ 2015. A person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretense, is entitled, except in one of the cases specified in the next section, to a writ of *habeas corpus*, or a writ of *certiorari*, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and in a case prescribed by law, of delivering him therefrom. A writ of *habeas corpus* may be issued and served under this section, on the first day of the week, commonly called Sunday; but it cannot be made returnable on that day.

The right to relief from unlawful imprisonment by *habeas corpus* is not the creation of the statute, but existed at common law. *Tweed v. Liscomb*, 60 N. Y. 559.

Parent and child.—The writ may be applied for by a parent or guardian to obtain control of children. *People v. Mercein*, 8 Paige, 47. See *Mercein v. Barry*, 25 Wend. 65; *People v. Mercein*, 3 Hill, 399; *People v. Wilcox*, 22 Barb. 178; *Wilcox v. Wilcox*, 4 Kern. 575; see, also, *People v. Cooper*, 1 Duer, 725. The father is entitled to custody of the child as against the mother, unless circumstances exist making a different disposition proper, as the tender years of the infant. *People v. Mercein*, 8 Paige, 47; *People v. Chegaray*, 18 Wend. 637; *People v. Nickerson*, 19 id. 16; *People v. Humphreys*, 24 Barb. 521; *People v. Olmstead*, 27 id. 9; 2 Kent's Com. 194; *People v. Mercein*, 3 Hill, 399. The fact of parents living apart may entitle the mother to custody of an infant. *Mercein v. Barry*, 25 Wend. 64; *People v. Mercein*, 8 Paige, 48. The husband may lose his right to the custody by immorality or inability to provide for its support, or the court may assign it to another when it is manifestly for the well being of the child. Cases cited *supra*; *Matter of Cuneen*, 17 How. 516; *Matter of Holmes*, 19 id. 329. The inclination of the infant may be consulted in a proper case. *Jones v. Erbert*, 17 Abb. 395; *People v. Kling*, 6 Barb. 366; *Matter of Waldron*, 13 Johns. 418; *Peo*

ple v. Wilcox, 22 Barb. 178; *People v. Pillow*, 1 Sandf. 672; *Matter of McDowles*, 8 Johns. 329; *People v. Cooper*, 8 How. 288. The father of a bastard has no right to its control; its mother is entitled to its custody in case she is a proper person. *People v. Kling*, 6 Barb. 366; *Robalina v. Armstrong*, 15 id. 247; *Matter of Doyle*, Clarke's Ch. 157; *Jones v. Erbert*, 17 Abb. 397. It is provided by 2 R. S. 148, § 1, that where parents live separately the mother may apply for the writ to the Supreme Court. *People v. Manley*, 2 How. 61; *People v. Chegaray*, 18 Wend. 637; *People v. Mercein*, 8 Paige, 48; *People v. Nickerson*, 19 Wend. 18. In such case the petition should be presented to the court and the writ should be issued by the court. A judge at chambers cannot issue it. *People, ex rel., v. Osborn*, 6 Civ. Pro. 299. Any one may ordinarily appear and litigate for the child. *People v. McLeod*, 3 Hill, 654, note. It is laid down by Hurd, in his admirable treatise on *Habeas Corpus*, that in exercising the jurisdiction in *habeas corpus* the following principles deduced from the cases are of general application:

"*First*. The court is in no case bound to deliver the child into the custody of any claimant, or of any other person, but may leave it in such custody as the welfare of the child at the time appears to require.

"*Second*. In controversies between parents for the custody of their legitimate children, the right of the father is held to be paramount to that of the mother; but the welfare of the child, and not the technical legal right, is the criterion by which to determine to whom the custody of the child shall be awarded.

"*Third*. In controversies between parents for the custody of their illegitimate children, the right of the mother is paramount; but, as in the last case, the welfare of the child and not the technical legal right determines the custody.

"*Fourth*. In all cases, if the child has arrived at the age of discretion, it will be permitted to elect in whose custody it will remain, provided its choice under the circumstances does not, in the opinion of the court, lead to an improper custody."

A guardian may have the writ to bring up the person of his ward. Hurd on *Habeas Corpus*, 554. Where there is an adjudication that petitioner is not, and respondent is, entitled to the custody of an infant, it is a bar to a subsequent *habeas*; otherwise if the petition is dismissed. *Matter of Price*, 12 Hun, 508. But that a former *habeas* is not *res adjudicata* when the questions raised are

THE WRIT OF HABEAS CORPUS.

upon the same facts, is held in *People v. Fancher*, *People v. Brady*, 56 N. Y. 182. It is questioned in *Silmore*, 26 Hun, 1, whether a person lawfully having custody of a child, and permitting it to be used contrary to the provisions of the act to prevent wrongs to children, can be regarded as illegally confining or restraining a child.

Persons imprisoned. — A prisoner may be brought up on this writ and inquiry made into the jurisdiction of the committing magistrate or court passing sentence. *Devlin's Case*, 5 Abb. Pr. 281; *People v. Cassells*, 5 Hill, 164; *Catlin v. Neilson*, 16 Hun, 214; *People, ex rel. Stokes, v. Risely*, 38 id. 280; *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 559. Or that the court committing him was not legally constituted. *Matter of Divine*, 21 How. Pr. 80; *People v. Divine*, 5 Park. Cr. 42. If, upon the whole record, the judgment was not warranted by law the writ is available. The court will examine to see whether there was jurisdiction to render the particular judgment. *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 559. Where the process issued is not allowed by law the writ will issue. *Squire's Case*, 12 Abb. Pr. 38. The legality of arrest under civil process may thus be inquired into. *People v. Kelly*, 35 Barb. 444; *People v. Willet*, 6 Abb. Pr. 37; S. C., 15 How. 210. But see *Cable v. Cooper*, 15 Johns. 152; *Bank v. Jenkins*, 18 id. 305. The prisoner may have the writ before indictment to inquire whether the evidence was sufficient to hold him. *People v. Martin*, 1 Park. Cr. 187; *People v. Tompkins*, id. 224; *Ex parte Tayloe*, 5 Cow. 39; *People v. Stanley*, 18 How. 179. When a prisoner is improperly held by coroner the writ issues. *People v. Budge*, 4 Park. Cr. 519. But it will not issue to inquire as to sufficiency of indictment. *People v. McLeod*, 25 Wend. 483; S. C., 1 Hill, 377; *People v. Rulloff*, 5 Park. Cr. 77. It has been held that the correctness of a sentence as to the place of imprisonment cannot be thus inquired into. *People, ex rel. Rice, v. Keeper of Penitentiary*, 37 How. 494. Nor can the question be raised on *habeas* as to whether a former trial is a bar to an indictment. *People v. Rulloff*, 3 Park. Cr. 126. But the sufficiency of a commitment may be inquired into. Abbott's Dig., vol. 3, p. 566. Informality in a commitment for contempt is not available on *habeas corpus*. *People v. Nevins*, 1 Hill, 154; *Davison's Case*, 13 Abb. Pr. 129; *People v. Goodhue*, 2 Johns. Ch. 198; *People, ex rel. Kearny, v. Kelly*, 22 How. Pr. 309; *Kahn's Case*, 11 Abb. 147; S. C., 19 How. 475. Only two questions can be inquired into in such case — jurisdiction and form of commitment. *People*

v. *Sheriff of New York*, 29 Barb. 622. In case the alleged contempt is innocent or meritorious, the writ will lie, and it may be questioned collaterally on *habeas*. *People, ex rel. Hackley, v. Kelly*, 24 N. Y. 74. An order committing a party for a civil contempt, which fails to comply with the law that it shall adjudge that the misconduct complained of was calculated to, or did actually defeat, impair, impede or prejudice the rights or remedies of a party, furnishes no foundation for imprisonment and is without jurisdiction. The party is entitled to be relieved from imprisonment on *habeas*. *Matter of Swenarton*, 40 Hun, 41. If confined as for a contempt for non-payment of money, see *People v. Cowles*, 4 Keyes, 38; distinguished, 69 N. Y. 544; *Matter of Watson*, 5 Lans. 466. Under section 50 of the former *habeas corpus* act a pardon might be proven under the writ. *In re Edymoin*, 8 How. 478. The writ was held to lie to bring the prisoner from the jail in one county to another. *People v. Mason*, 9 Wend. 505. A person committed under the judgment of a competent tribunal cannot have the writ. *People, ex rel. Phelps, v. Oyer and Terminer of New York*, 14 Hun, 21. The constitutionality of an act under which a commitment was made cannot be inquired into. *Matter of Donohue*, 1 Abb. N. C. 1. Legality of judgment of a court-martial having jurisdiction cannot be inquired into. *Underhill v. Fullerton*, 10 Hun, 63. An erroneous decision as to amount of costs and expenses to be inserted in a judgment cannot be reviewed by the writ. *People, ex rel. Woolf, v. Jacobs*, 66 N. Y. 8. A prisoner not brought to trial may have *habeas corpus*, unless sufficient cause for detention is shown. *Estes v. Warden City Prison*, 11 Week. Dig. 271. A prisoner confined on civil process may be discharged if process is defective or not allowed by law. *People, ex rel. Fries, v. Reilly*, 25 Hun, 587. The question of sanity of person confined in an insane asylum may be thus tried. *Matter of Dixon*, 11 Abb. N. C. 118. But this question should not be tried in this manner where there are pending proceedings before a jury. *Matter of Laurent*, 11 Abb. N. C. 120. Questions of fact cannot be retried. *Matter of Wright*, 29 Hun, 357; *Matter of Moses*, 13 Abb. N. C. 189; *Matter of Francesca*, 66 How. Pr. 178. A person confined under a commitment void on its face may have the writ. *People, ex rel. Knowlton, v. Sadler*, 2 N. Y. Cr. 438. Under a void sentence but valid conviction, the prisoner must be remanded. *People, ex rel. Devoe, v. Kelly*, 97 N. Y. 212. If on proper facts court has jurisdiction, matters of fact cannot be reviewed on *habeas corpus*. *Peo-*

ple, ex rel. Martin, v. Walters, 15 Abb. N. C. 461; *People, ex rel. Peterson, v. Sisters of St. Dominick*, 34 Hun, 463. Where a relator was sentenced to be punished beyond the jurisdiction of the court before which he was tried, it was held he might have *habeas corpus* to obtain release from illegal imprisonment under the sentence, and that his right to the remedy was not affected by the fact that he might have reviewed the sentence by appeal. *People v. Risely*, 38 Hun, 280. Where the prisoner is held under a judgment or decree, it is the duty of the judge to inquire into the jurisdiction of the tribunal to render the judgment or decree and to discharge the prisoner where it appears there was a lack of jurisdiction of the person or the subject-matter. *People, ex rel. Frey, v. Warden County Jail*, 100 N. Y. 20; reversing 34 Hun, 393. See *People v. Walters*, 7 Civ. Pro. 406.

Extradition.—The writ will issue to examine into the grounds on which a prisoner is extradited, and if papers are defective, he may be discharged. *People, ex rel., v. Brady*, 56 N. Y. 182; *People, ex rel., v. Pinkerton*, 77 id. 245; *People, ex rel., v. Davis*, 8 Week. Dig. 128. The affidavits before the governor may be examined by the court. *People, ex rel., v. Reilly*, 11 Hun, 89. But, in the absence of proof to the contrary, the recital in the warrant is sufficient. 77 N. Y. 245, *supra*. The only questions in such a case, where the executive warrant is valid on its face, is as to identity, and whether he is a fugitive from justice from the State demanding his return. *People, ex rel. McCoy, v. Warden of City Prison*, 3 N. Y. Cr. 370.

§ 2016. A person is not entitled to either of the writs specified in the last section, in either of the following cases:

1. Where he has been committed, or is detained, by virtue of a mandate, issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.
2. Where he has been committed, or is detained, by virtue of the final judgment or decree, of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree or final order.

It has been said that the writ may issue even where the detention is by alleged authority of the United States. *People, ex rel., v. Gaul*, 44 Barb. 98; *Matter of Sullivan*, 1 N. Y. Leg. Obs. 314. See *Matter of Barrett*, 42 Barb. 479; S. C., 25 How. 380. But under it, soldiers enlisted by the United States cannot be discharged.

Matter of O'Connor, 48 Barb. 258; *Reilly's Case*, 2 Abb. (N. S.) 334; *Matter of Ferguson*, 9 Johns. 239. The rule as laid down in *Turble's Case*, 13 Wall. 397, is that after a State judge issuing the writ is fully apprised by the return of the officer that the person is in custody of the United States, he can proceed no further; and this seems to be the now settled practice.

Error in the trial or judgment cannot be shown; expiration of term, reversal or pardon may be. *People v. Cavanagh*, 2 Abb. 84; *Bennac v. People*, 4 Barb. 31; *People v. Cassells*, 5 Hill, 164. Nor can the regularity of the proceedings, nor the sufficiency of evidence, or accuracy of decisions, not affecting jurisdiction, be brought up on *habeas corpus*. *Baker's Case*, 11 How. 418; *People v. McCormick*, 4 Park. Cr. 9. Nor the legality of a judgment, where the court had jurisdiction or power to render it. *People v. Fullerton*, 10 Hun, 63. The only question is as to the jurisdiction to try the relator and make the commitment. *People v. Neilson*, 16 id. 214. The merits cannot be reviewed. *People v. Shea*, 3 Park. Cr. 562; *People v. Keeper of Penitentiary*, 37 How. 494; *Case of Twelve Commitments*, 19 Abb. 394. The writ cannot be used to try the title to any office. *Matter of Wakker*, 3 Barb. 162. The writ will issue when a prisoner is confined for contempt, leaving the question as to whether it is a criminal contempt to be determined on the hearing. This rule was adopted to settle questions arising from the decisions in *Watson's Case*, 3 Lans. 408; *People, ex rel., v. Cowles*, 3 Abb. Ct. App. Dec. 507; 4 Keyes, 38; *People, ex rel., v. Hackley* 24 N. Y. 74.

§ 2017. Application for the writ must be made by a written petition, signed either by the person for whose relief it is intended, or by some person in his behalf, to either of the following courts or officers:

1. The Supreme Court, at a Special or General Term thereof, where the prisoner is detained within the judicial district within which the term is held.
2. A justice of the Supreme Court, in any part of the State.
3. An officer authorized to perform the duties of a justice of the Supreme Court at chambers, being or residing within the city or county where the prisoner is detained; or, if there is no such officer within that city or county capable of acting, or, if all those who are capable of acting and authorized to grant the writ are absent, or have refused to grant it, then to an officer authorized to perform those duties residing in an adjoining county.

The language of this section has been made so clear and explicit, that the decisions as to the proper judge to whom to apply are practically obsolete. A simple reference to the statute as to who is authorized to perform duties of Supreme Court justice at chambers is sufficient (see § 241, Code Civ. Pro.). *People, ex rel. Clarke, v. Clarke*, 64 How. 7.

§ 2018. Where application for either writ is made as prescribed in subdivision third of the last section, without the county where the prisoner is detained, the officer must require proof, by the oath of the person applying, or by other sufficient evidence, of the facts which authorize him to act as therein prescribed; and if a judge in that county, authorized to grant the writ, is said to be incapable of acting, the cause of the incapacity must be specially set forth. If such proof is not produced, the application must be denied.

It is held (*People v. Barnett*, 13 Abb. 8) that such an affidavit is necessary. The affidavit should be explicit, and it is not enough for the deponent to state he cannot find a judge, and it should not be made several days before the application. *Id.* By *People v. Folmsbee*, 60 Barb. 480, and *People, ex rel., v. Hanna*, 3 How. 39, it is held that this does not affect the jurisdiction. As this section now stands these latter decisions seem to be obsolete.

Precedent for Affidavit.

ULSTER COUNTY ss.:

John F. Cloonan, of the city of Kingston, being duly sworn, says that he is attorney for Patrick Larkin, who subscribed and verified the petition for a writ of *habeas corpus* hereto annexed. That there is no Special or General Term of the Supreme Court now in session in the county of Ulster, where the petitioner is confined. That there is no justice of the Supreme Court in the county of Ulster, or any officer authorized to perform his duties except the county judge of said county, who is incapacitated from performing the duties of his office by reason of sickness.

Wherefore the petitioner applies to the county judge of the county of Greene, an adjoining county, for the writ prayed for in the petition.
(*Jurat.*) (Signature.)

§ 2019. The petition must be verified by the oath of the petitioner, to the effect that he believes it to be true; and must state, in substance:

1. That the person, in whose behalf the writ is applied for, is imprisoned, or restrained in his liberty; the place where, unless it is unknown, and the officer or person by whom he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party, whose name is unknown.

2. That he has not been committed, and is not detained, by virtue of any judgment, decree, final order, or process, specified in section two thousand and sixteen of this act.

3. The cause of pretense of the imprisonment or restraint, according to the best knowledge and belief of the petitioner.

4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition; unless the petitioner avers, either, that by reason of the removal or concealment of the prisoner before the application, a demand of such a copy could not be made, or that such a demand was made, and the legal fees for the copy were tendered to the officer, or other person, having the prisoner in his custody, and that the copy was refused.

5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists.

6. It must specify whether the petitioner applies for the writ of *habeas corpus*, or for the writ of *certiorari*.

The petition must show the place of the detention of the prisoner or it is defective. It should also negative the fact of the detention by virtue of a judgment or decree. *People v. Cowles*, 59 How. 287. It is defective if it does not state that the person in whose behalf it is asked is not detained by virtue of a final order made by a competent tribunal. *People, ex rel., v. Osborn*, 6 Civ. Pro. 299.

Precedent for Petition.

To Hon. WILLIAM S. KENYON, County Judge of Ulster County:

The petition of Richard Stokes respectfully shows, that he is now a prisoner confined in the custody of George Young, sheriff of Ulster county, at the county jail in said county, for a supposed criminal offense.

Your petitioner further shows, that such confinement is by virtue of a commitment made by one F. D. L. Montanye, a justice of the peace of the town of Marbletown, a copy of which is hereto annexed, and to which reference is made for the grounds thereof.

And your petitioner further shows that, to his best knowledge and belief, he is not committed or detained by virtue of any process issued by any court of the United States or any judge thereof, or by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or final order of such court, or by virtue of any execution upon such judgment or decree.

Your petitioner further shows, that he is advised by his counsel, John F. Cloonan, of Kingston, N. Y., and verily believes that his imprisonment is illegal, and that such illegality consists in this: That the commitment of said magistrate commits him to the county jail for the period of one year in default of payment of the fine of \$250 thereby imposed, and that it is void under section 718 of the Code of Criminal Procedure.

Wherefore your petitioner prays a writ of *habeas corpus* to the end that he may be bailed or discharged from custody.

Dated April 31, 1887.

RICHARD STOKES.

JOHN F. CLOONAN,

Attorney for Petitioner.

(Add verification.)

Precedent for Petition to Obtain Custody of Infant.

To the Supreme Court of the State of New York:

The petition of Alonzo Freeman, of the city of Kingston, Ulster county, respectfully shows: That he is the husband of Celia Freeman, who also resides in said city but apart from your petitioner. That said Celia Freeman has the custody of an infant child of your petitioner and his said wife, named Henry Freeman, aged thirteen years.

That your petitioner is engaged in business as a master mechanic in said city and is able and willing to support said child; that he resides with his mother, the grandmother of said child, who is willing to take the care of said child so far as may be necessary, and that the petitioner is desirous that said child shall have a home with your petitioner and its grandmother. That his said wife has no means of her own for the support or education of said child.

Wherefore your petitioner prays a writ of *habeas corpus* to deliver said child from the custody of its mother, and that your petitioner may be awarded the custody of said child.

(*Signature and verification as to pleading.*)

§ 2020. A court or a judge, authorized to grant either writ, must grant it without delay, whenever a petition therefor is presented, as prescribed in the foregoing sections of this article, unless it appears, from the petition itself, or the documents annexed thereto, that the petitioner is prohibited by law from prosecuting the writ. For a violation of this section, a judge, or, if the application was made to a court, each member of the court, who assents to the violation, forfeits to the prisoner one thousand dollars, to be recovered by an action in his name, or in the name of the petitioner to his use.

The act of issuing a *habeas* is held to be ministerial and not judicial. *Nash v. The People*, 36 N. Y. 607.

§ 2021. The writ of *habeas corpus*, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"*The People of the State of New York, to the Sheriff of,*" etc. [or "*to A. B.*"]:

"We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. is called or charged, before _____" ["the Supreme Court, at a Special" (or General) "Term thereof, to be held," or "E. F., justice of the Supreme Court," or otherwise, as the case may be]. "at _____, on _____" [or "immediately after the receipt of this writ"], to do and receive what shall then and there be considered, concerning the said C. D. And have you then there this writ.

"Witness, _____, one of the justices" (or "judges") "of the said court [or "county judge," or otherwise, as the case may be], "the _____ day of _____, in the year eighteen hundred and _____."

Precedent for Habeas.

The People of the State of New York, to George Young, Sheriff of the County of Ulster:

We command you that you have the body of Richard Stokes, by you imprisoned and detained as it is said, together with the [L. S.] time and cause of such imprisonment and detention, by whatsoever name the said Richard Stokes is called or charged, before William S. Kenyon, Esq., county judge of Ulster county, at his chambers in the city of Kingston, in the county of Ulster, at nine o'clock in the forenoon, on the 2d day of May, 1887, to do and receive what shall then and there be considered concerning the said Richard Stokes, and have you then there this writ.

Witness, Hon. William S. Kenyon, county judge of Ulster county, at Kingston, this 31st day of June, 1887.

JACOB D. WURTS,
Clerk.

Indorsed:—"The within writ allowed this 31st day of April, 1887."

WILLIAM S. KENYON,
County Judge of Ulster County.

The tender of fees and bond are not required in case a district

attorney or the attorney-general applies for the writ. § 2002. Otherwise, sections 2000 and 2001 must be complied with.

§ 2022. The writ of *certiorari*, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"*The People of the State of New York, to the Sheriff of,*" etc. [or "to A. B."].

"We command you that you certify fully and at large, to _____" ["the Supreme Court, at a Special," (or "General") Term thereof, to be held," or "E. F. justice of the Supreme Court," or otherwise, as the case may be], "at _____ on _____" [or "immediately after the receipt of this writ"], "the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D. is called or charged. And have you then there this writ.

"Witness, _____, one of the justices" (or "judges") "of the said court" or "county judge," or otherwise, as the case may be], "the _____ day of _____, in the year eighteen hundred and _____."

§ 2023. If application for either writ is made to the Supreme Court, or to a justice thereof, in a county other than that where the person is imprisoned or confined, the writ may be made returnable, in its or his discretion, before any judge authorized to grant it, in the county of the imprisonment or confinement.

§ 2024. The writ of *habeas corpus* or the writ of *certiorari* shall not be disobeyed, for any defect of form, and particularly in either of the following cases:

1. If the person having the custody of the prisoner, is designated, either by his name of office, if he has one, or by his own name; or, if both names are unknown or uncertain, by an assumed appellation. Any person, upon whom the writ is served, is deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person.

2. If the prisoner directed to be produced, is designated by name, or otherwise described in any way, so as to be identified as the person intended.

§ 2025. Where a justice of the Supreme Court, in court or out of court, has evidence, in a judicial proceeding taken before him, that any person is illegally imprisoned or restrained in his liberty, within the State; or where any other judge, authorized by this article to grant the writs, has evidence, in like manner, that any person is thus imprisoned or restrained, within the county where the judge resides; he must issue a writ of *habeas corpus* or a writ of *certiorari*, for the relief of that person, although no application therefor has been made.

§ 2026. The person upon whom either writ has been duly served, must state plainly and unequivocally, in his return:

1. Whether or not, at the time when the writ was served, or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued.

2. If he so had that person when the writ was served, and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate or other written authority, a copy thereof must be annexed to the return, and, upon the return of the writ, the original must be produced and exhibited to the court or judge.

3. If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must conform to the return required by the second subdivision of this section, except that the substance of the mandate or other written authority may be given, if the original is no longer in his hands; and that the return must state particularly to whom, at what time, for what cause, and by what authority, the transfer was made.

The return must be signed by the person making it, and, ~~unless~~ he is a sworn public officer, and makes his return in his official capacity, it must be verified by his oath.

Precedent for Return, where Person is in Custody.

To the Hon. WILLIAM S. KENYON, County Judge of Ulster County :

In obedience to the writ of *habeas corpus* hereto annexed, I certify and return: That on the 31st day of April, 1887, and before the said writ came to me, the said Richard Stokes was in my custody and detained by me in the county jail of the county of Ulster, under and by virtue of a commitment, a copy of which is hereto annexed, issued by F. D. L. Montanye, Esq., a justice of the peace of the town of Marbletown in said county. That the said Richard Stokes is still in my custody under said commitment, all of which I certify and have now here the body of said Richard Stokes, as by said writ I am commanded.

GEORGE YOUNG,
Sheriff.

Precedent for Return where Person is not in Custody of Party to whom Writ is Directed.

SUPREME COURT.

In the Matter of the Application of
Alonzo Freeman for a Writ of *Habeas*
Corpus to bring up the body of Henry
Freeman, infant.

To the Supreme Court of the State of New York :

The return of Celia Freeman alleges and shows to the court that the infant, Henry Freeman, is not and has not been at any time for three months last past under her control or in her custody.

That as she is informed and believes, the said Henry Freeman is now at Litchfield, in the State of Connecticut, and your petitioner cannot produce the body of said Henry Freeman.

Dated December 28, 1885.

CELIA FREEMAN.

(Add verification.)

Production of the commitment is not sufficient. *Matter of Hal-ler*, 3 Abb. N. C. 65. The sworn statement of a party on whom the writ was not served is not admissible as a return. *People, ex rel., v. Mercein*, 8 Paige, 47. An officer making a return should show that the prisoner is not under his control. *Matter of Stacy*, 10 Johns. 328. A sheriff's return should be construed liberally. *People v. Nevins*, 1 Hill, 154. A return may be amended. 5 Wait's Pr. 532, and cases cited; 3 Hill, 657, note; *Matter of Hobson*, 40 Barb. 34. The answer in writing signed by the party to whom the writ is addressed, stating the time and cause of the caption and detention of the prisoner, and his production before the court

or judge, or if the prisoner is not produced, then the reason for not producing him, constitutes the return.

This should be made without delay. It is not absolutely necessary that the party to whom the writ is addressed should appear before the court if the prisoner is produced. Hurd on Habeas Corpus, 235. The return should be as was held by Chancellor Kent in case of non-production of the party, in case of a military officer, that he is not in his possession or power. *Matter of Stacy*, 10 Johns. 328. The return in case of non-production of the prisoner must be full and complete, and an evasive return will not be tolerated. *Rex v. Win-ton*, 5 T. R. 89. The time and cause of the taking must be stated in the return and body produced, and to justify the detention sufficient authority must be shown.

The entire history of the proceeding may be set out in the return and copies of all papers should be annexed. *Shaw v. Smith*, 8 Ind. 485; *Rex v. Clark*, 3 Salk. 349. When an officer is called on for a return he should produce a copy of the record showing the commitment. *Randall v. Bridge*, 2 Mass. 549.

§ 2027. The person upon whom a writ of *habeas corpus* has been duly served, must also bring up the body of the prisoner in his custody, according to the command of the writ, unless he states, in his return, that the prisoner is so sick or infirm that the production of him would endanger his life or his health.

The production of the body is a necessary element of the writ which issues for the purpose of protecting the liberty of the person. As in ordinary proceedings the determination of the right to his liberty is the matter for ultimate decision; the writ begins with a demand for that liberty, and demands his presence before the court for summary determination. As has heretofore been said and appears by the foregoing section, the return must give the reason for non-production in case of sickness or infirmity. Without the production of the body the case has no status. *In re Lampert*, 10 Week. Dig. 109.

§ 2028. Where a person, who has been duly served with either writ, refuses or neglects, without sufficient cause shown by him, fully to obey it, as prescribed in the last two sections, the court or judge before which or whom it is made returnable, upon proof of the due service thereof, must forthwith issue a warrant of attachment, directed generally to the sheriff of any county where the delinquent may be found, or, if the delinquent is a sheriff, to any coroner of his county, or to a particular person specially appointed to execute the warrant, and designated therein, commanding such officer or other person forthwith to apprehend the delinquent and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made committing him to close custody in the jail of the county in which the court or judge is; or, if he is a sheriff, in the jail

of a county, other than his own, designated in the order; and, in either case, without being allowed the liberties of the jail. The order must direct that he stand committed until he makes return to the writ, and complies with any order, which may be made by the court or judge, in relation to the person for whose relief the writ was issued.

*Precedent for Warrant of Attachment for Disobedience to Writ.
The People of the State of New York, to the Sheriff of the County of
Ulster, in the State of New York:*

WHEREAS, On the 20th day of December, 1885, a writ of *habeas corpus* was issued out of the Supreme Court, directed to Celia Freeman, commanding her to have the body of Henry Freeman before the Special Term of said court, to be held at the court-house in the city of Kingston, on the 28th day of December, 1885, then to do and receive what should be then and there considered; and

WHEREAS, It appears by the affidavit of Thomas B. Johnson, filed this day, that service of such writ was duly made on said Celia Freeman on the 20th day of December, 1885; and

WHEREAS, The said Celia Freeman has neglected, without sufficient cause shown by her, to obey said writ as prescribed by law, in that she has not appeared in said court in obedience to said writ, nor produced the body of said Henry Freeman, nor made return to said writ: You are, therefore, commanded to forthwith arrest, and apprehend the said Celia Freeman, and bring her before the Supreme Court, at a special term thereof, to be held at the court-house in the city of Albany, on the 12th day of January, 1886, at the opening of the court on that day, then and there to be dealt with according to law, and let this be your warrant.

Witness, Hon. Alton B. Parker, justice of the Supreme Court,
[L. s.] at the court-house in Kingston, this 28th day of December,
1885.

J. D. WURTS,
Clerk.

S. T. HULL,
Attorney for Petitioner.

Indorsed:—"Granted this 28th day of December, 1885, on application of Alonzo Freeman."

A. B. PARKER,
Justice Supreme Court.

Precedent for Commitment.

At a Special Term of the Supreme Court, held at the court-house in the city of Albany, on the 12th day of January, 1886:

Present — Hon. Alton B. Parker, *Justice.*

SUPREME COURT.

In the Matter of the Application of
Alonzo Freeman for a Writ of *Habeas
Corpus* to inquire into the cause of
the detention of Henry Freeman, an
infant.

WHEREAS, On the 20th day of December, 1885, a writ of *habeas corpus* was issued out of this court, commanding Celia Freeman to

produce the body of Henry Freeman, an infant, before a Special Term of this court, to be held at the court-house in Kingston, on the 28th day of December, 1885, and on that day due proof of service of such writ was made on said Celia Freeman, and she neglected to appear or make return to said writ or produce the body of said Henry Freeman; and

WHEREAS, A warrant of attachment was issued commanding the sheriff of the county of Ulster to arrest and apprehend the said Celia Freeman, and bring her before this court at this term thereof; and

WHEREAS, The said Celia Freeman has been brought before the court as in said warrant of attachment commanded, and no sufficient cause has been shown for such neglect to produce the body of said Henry Freeman, as by said writ commanded, but said Celia Freeman still refuses to comply with the direction in said writ contained: Now on motion of S. T. Hull, Esq., attorney for petitioner,

It is ordered, that the said Celia Freeman be committed to close custody in the county jail of the county of Ulster, and without the liberties of said jail, there to stay and stand committed until she makes return to said writ and fully obeys the same, and complies with order which may be made by the court in relation to the person of said Henry Freeman.

A. B. PARKER,

Justice Supreme Court.

§ 2029. The court or judge may also, in its or his discretion, at the time when the warrant of attachment is issued, or afterward, issue a precept to the sheriff, coroner, or other person, to whom the warrant is directed, commanding him forthwith to bring before the court or judge the person for whose benefit the writ was granted, who must thereafter remain in the custody of the officer or person executing the precept, until discharged, bailed, or remanded, as the court or judge directs.

Precedent for Precept to bring up Prisoner on Disobedience to Writ.

The People of the State of New York, to the Sheriff of the County of Ulster:

WHEREAS, A writ of *habeas corpus* was heretofore issued and served commanding Celia Freeman to bring the body of Henry Freeman before this court at a term thereon specified, and she neglected so to do, and failed to make return to said writ; and

WHEREAS, A warrant of attachment was, therefore, issued to the sheriff of Ulster county, commanding him to bring the said Celia Freeman before the court at this term thereof, to be dealt with according to law; and

WHEREAS, The said Celia Freeman has this day been brought before the court and failed to show sufficient cause for her neglect and disobedience of the writ, and still refuses to comply with the command thereof: Now on motion of S. T. Hull, attorney for petitioner,

We do, therefore, command you forthwith to bring the said Henry Freeman before this court, to remain in your custody till discharged or remanded, as may hereafter be directed, and this shall be your warrant.

Witness, Hon. A. B. Parker, justice of the Supreme Court, this [L. s.] 12th day of January, 1886.

J. D. WURTS, *Clerk.*

Indorsed:—"Granted this 12th day of January, 1886, on application of Alonzo Freeman."

A. B. PARKER,

Justice Supreme Court.

§ 2030. The sheriff, coroner, or other person, to whom a warrant of attachment or precept is directed, as prescribed in either of the last two sections, may, in the execution thereof, call to his aid the power of the county, as a sheriff may do, in the execution of a mandate issued from a court of record.

§ 2031. The court or judge, before which or whom a prisoner is brought by virtue of a writ of *habeas corpus*, issued as prescribed in this article, must, immediately after the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint, or for the continuance thereof, is shown; whether the same was upon a commitment for an actual or supposed criminal matter, or for some other cause.

If the restraint is not alleged to be by virtue of legal process the truth of all matters returned may be inquired into. *People v. Cassells*, 5 Hill, 164. Material facts stated in return not denied by the party brought up must be taken to be true. *People, ex rel. Evans, v. McEwen*, 67 How. 105. The facts contained in the return must be first inquired into. *Squire's Case*, 12 Abb. 39. Illegal restraint must be either proved or admitted. *People v. Cooper*, 1 Duer, 709. If no question of fact is raised the question is one of law as upon a demurrer. *Bennac v. People*, 4 Barb. 31; *Matter of Decosta*, 1 Park. 129. See 3 Hill, 658, note. The existence and validity of process under which a prisoner is held are the proper subjects of inquiry. *Matter of Lagrave*, 45 How. 301. It is only the facts necessarily involved that will be determined. *People v. Wilcox*, 22 Barb. 186.

§ 2032. The court or judge must forthwith make a final order to remand the prisoner, if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired:

1. By virtue of a mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction.
2. By virtue of the final judgment or decree of a competent tribunal, of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.
3. For a criminal contempt, defined in section eight of this act, and specially and plainly charged in a commitment, made by a court, officer, or body, having authority to commit for the contempt so charged.

The court must under some state of facts have had jurisdiction to render the judgment given in order to prevent inquiry, and discharge of prisoner on *habeas*. *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 559. This must be determined by the court on the hearing. *People v. Bowe*, 58 How. 393; *People v. Oyer and Terminer*, 14 Hun, 21. Pardon is ground of discharge. *People v.*

Edymoin, 8 How. 478. And the court cannot inquire whether the proceedings to obtain it were regular. The record on summary conviction may be examined. *Re Sweatman*, 1 Cow. 144; *Re Phillips*, 1 Park. Cr. 95; *People v. Martin*, id. 187. Final process is held to be reviewable when there is in fact no judgment or decree, or where the judgment or conviction is void. *Ex parte Beatty*, 12 Wend. 229; *People v. Rawson*, 61 Barb. 619; *People v. Willett*, 15 How. 210; *Matter of Divine*, 11 Abb. 90; S. C., 21 How. 80. The competency of the tribunal to render a judgment or decree, under which a person is held in custody, and the jurisdiction over him as to either matter, place, sum or person, is the subject of inquiry before a judge or court issuing the writ, and the court is expressly required to institute an inquiry into the cause of the detention and to discharge the prisoner when there is a lack of jurisdiction on the part of the tribunal, making an order for his detention. *People, ex rel., v. Warden, etc.*, 100 N. Y. 20; citing *Tweed v. Liscomb*, 60 id. 559; and *Ferguson v. Crawford*, 70 id. 257.

Form of Order Remanding Prisoner.

In the Matter of the Application of Richard Stokes for a Writ of <i>Habeas</i> <i>Corpus</i> .
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It appearing on return of the writ of *habeas corpus* allowed by me, that Richard Stokes, upon whose petition the said writ was issued, is lawfully detained by the sheriff of Ulster county by virtue of a commitment, a copy of which is annexed to the said petition, and by virtue of the conviction of the said Stokes by a Court of Special Sessions, a copy of a certificate of which conviction is annexed to the return of the said sheriff and made a part thereof, and that the said Richard Stokes is not entitled to be bailed:

I do hereby finally order that all the proceedings in this matter be and the same hereby are dismissed and the prisoner remanded to the custody of the sheriff.

WILLIAM S. KENTON,

Dated May 2, 1887.

County Judge of Ulster County.

The Code has made changes in the rule as to contempts on *habeas corpus*, and sections 2016 and 2032 must be read together and the authorities applied to the changed statute.

The revisers in their note to section 2016, as originally reported, give their understanding of the Code to be that the writ may now issue, even though the commitment was for criminal contempt, leaving the determination of the rights of the prisoner to be governed by the proof under section 2032, and in case it is a civil contempt, he may be discharged; if a criminal contempt, he must be remanded.

The cases under the Revised Statutes will be found collated in Bliss' Annotated Code, under section 2032.

§ 2033. If it appears, upon the return, that the prisoner is in custody by virtue of a mandate in a civil cause, he can be discharged, only in one of the following cases:

1. Where the jurisdiction of the court which, or of the officer who, issued the mandate, has been exceeded, either as to matter, place, sum, or person.
2. Where, although the original imprisonment was lawful, yet by some act, omission, or event, which has taken place afterward, the prisoner has become entitled to be discharged.
3. Where the mandate is defective in a matter of substance required by law, rendering it void.
4. Where the mandate, although in proper form, was issued in a case not allowed by law.
5. Where the person, having the custody of the prisoner under the mandate, is not the person empowered by law to detain him.
6. Where the mandate is not authorized by a judgment, decree, or order of a court, or by a provision of law.

In order to entitle one to discharge the process must be void, not voidable; defects which may be cured by amendment make process only voidable. *People, ex rel. Utley, v. Seaton*, 25 Hun, 305; *Benedict v. Thayer*, 20 id. 547.

Order Discharging Prisoner.

In the Matter of the Application of
Richard Stokes for a Writ of *Habeas*
Corpus.

WHEREAS, A writ of *habeas corpus* has been heretofore issued on the application of Richard Stokes to the sheriff of Ulster county, commanding him to bring up the body of said Stokes for the purpose of inquiry into the cause of his detention, and the said prisoner having been brought before me and an examination had, and it appearing on such examination that the said Richard Stokes is unlawfully imprisoned and restrained of his liberty by reason of want of jurisdiction on the part of the Court of Special Sessions at which he was tried: Now, after hearing John F. Cloonan on behalf of the prisoner, and J. N. Vanderlyn, district attorney, opposed — it is, therefore, finally ordered that the said Richard Stokes be and hereby is forthwith discharged from the custody of the sheriff of Ulster county, and from further imprisonment under and by virtue of the commitment of the Court of Special Sessions, made herein by F. D. L. Montanye, Esq., by which he was held by said sheriff.

Dated May 2, 1887.

WILLIAM S. KENYON,
County Judge of Ulster County.

§ 2034. But a court or judge, upon the return of a writ issued as prescribed in this article, shall not inquire into the legality or justice of any mandate, judg-

ment, decree, or final order, specified in the last section but one, except as therein stated.

This provision does not prevent a determination as to whether the court rendering the judgment had jurisdiction. *People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 720; *People, ex rel., v. Warden, etc.*, 100 id. 20, *supra*. But the court is not at liberty to go behind the conviction and retry the question of fact upon which it was made. *People v. Catholic Protectory*, 38 Hun, 127; affirmed on another point, 101 N. Y. 195. 559

§ 2035. If it appears that the prisoner has been legally committed for a criminal offense, or if he appears, by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offense, although the commitment is irregular, the court or judge, before which or whom he is brought, must forthwith make a final order, to discharge him upon his giving bail, if the case is bailable; or, if it is not bailable, to remand him. Where bail is given pursuant to an order made as prescribed in this section, the proceedings are the same as upon the return to a writ of *certiorari*, where it appears that the prisoner is entitled to be bailed.

This only applies where a party has been committed. *Matter of Gorsline*, 21 How. 85. Unless it appears that the court in a county to which a prisoner under arrest is being carried is not in session. *People v. Clews*, 77 N. Y. 39. The finding of an unauthorized inquest is not sufficient to hold a prisoner on *habeas*. *People v. Bridge*, 4 Park. Cr 519. Proof of guilt must be made at the hearing on the return and not afterward. *Matter of Heyward*, 1 Sandf. 701. If a military tribunal has no jurisdiction on hearing on the writ, a prisoner will be turned over to the civil authorities. *Matter of Martin*, 45 Barb. 142.

§ 2036. Where a prisoner is not entitled to his discharge, and is not bailed, he must be remanded to the custody, or placed under the restraint from which he was taken, unless the person in whose custody or under whose restraint he was, is not lawfully entitled thereto; in which case, the order remanding him must commit him to the custody of the officer or person so entitled.

§ 2037. Pending the proceedings, and before a final order is made upon the return, the court or judge, before which or whom the prisoner is brought, may either commit him to the custody of the sheriff of the county wherein the proceedings are pending, or place him in such care or custody, as his age and other circumstances require.

§ 2038. Where it appears, from the return to either writ, that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made until notice of the time when, and the place where, the writ is returnable, or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner, and for such previous length of time, as the court or judge prescribes, as follows :

1. Where the mandate was issued or made in a civil action or special proceeding, to the person who has an interest in continuing the imprisonment or restraint, or his attorney.

2. In every other case, to the district attorney of the county, within which the prisoner was detained, at the time when the writ was served.

For the purpose of an appeal, the person to whom notice is given, as prescribed in the first subdivision of this section, becomes a party to the special proceeding.

A copy of the petition need not be served, it is sufficient to serve a notice giving the time and place where the writ is made returnable. *Ex parte Beatty*, 12 Wend. 229. Notice must be given, although the party interested resides out of the county. *People v. Pelham*, 14 id. 48. In case of criminal contempt notice must be given the district attorney. *People v. Cassella*, 5 Hill, 164. Discharge of a prisoner without notice to the district attorney is irregular. *People, ex rel., v. Frink*, 41 Hun, 188. An order to show cause may, upon same grounds stated as in ordinary case, take the place of the notice of eight days.

Precedent for Notice to Interested Party.

To J. N. VANDERLYN, Esq., *District Attorney of Ulster County*:

Please take notice that a writ of *habeas corpus*, to inquire into the imprisonment of Richard Stokes, now confined by George Young, sheriff of Ulster county, in the common jail of said county, on a commitment made by a Court of Special Sessions in the town of Marbletown, has been issued, and made returnable on the 10th day of May, 1887, before the Hon. William S. Kenyon, county judge of Ulster county, at his chambers in the city of Kingston, at ten o'clock in the forenoon of that day.

Dated April 26, 1887.

JOHN F. CLOONAN,
Attorney for Petitioner.

§ 2039. A prisoner, produced upon the return of a writ of *habeas corpus*, may, under oath, deny any material allegation of the return, or make any allegation of fact, showing either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. Thereupon the court or judge must proceed, in a summary way, to hear the evidence produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires.

The principal authorities which relate to this section have been heretofore cited under sections 2031, 2032.

A reference cannot be ordered. *Matter of Smith*, 1 Crary's Sp. Proc. 387, as decision of Special Term by Judge Davies, it does not appear to have been reported. It is said by Mr. Hurd (p. 323) that affidavits may be read on the hearing, if properly taken and authenticated, but that their reception is a matter of discretion, and to be received cautiously; and in criminal cases only when the attendance of witnesses cannot be obtained. This view is to some extent sustained. *Matter of Heyward*, 1 Sandf. 702. The burden of proving defects in process is on the prisoner. *Id.* And if the material facts in the return are not denied they will be taken as true. 1

Park. Cr. 129. The principles laid down in *Tweed v. Liscomb*, and *People, ex rel., v. Warden, etc., supra*, will govern as to what can be inquired into and tried on this hearing, and dispose of many questions discussed in earlier cases, which are there cited.

Precedent for Answer traversing Return.

In the Matter of the Application of
Richard Stokes for a Writ of Habeas
Corpus.

The answer of Richard Stokes to the return to the writ of *habeas corpus* heretofore made, and filed herein by George Young, sheriff of Ulster county:

The said Richard Stokes denies that the commitment returned by the said sheriff is a valid commitment, and shows that the said commitment is invalid, null and void for the reason that the justice alleged to have made the same had no jurisdiction to try or sentence the said Richard Stokes; and further, that the said commitment was not in fact signed by said justice, and the signature thereto is not his act or deed, nor authorized by him.

JOHN F. CLOONAN,
Attorney for Petitioner.

(Add verification as to pleading.)

§ 2040. Where the return to a writ of *habeas corpus* states that the prisoner is so sick or infirm, that the production of him would endanger his life or health, and the return is otherwise sufficient, the court or judge, if satisfied of the truth of that statement, must decide upon the return, and dispose of the matter, as if a writ of *certiorari* had been issued.

§ 2041. Where an application is made for a writ of *habeas corpus*, as prescribed in this article, and it appears to the court or judge, upon the petition and the documents annexed thereto, that the cause or offense, for which the party is imprisoned or detained, is not bailable, a writ of *certiorari* may be granted instead of a writ of *habeas corpus*, as if the application had been made for the former writ.

§ 2042. Upon the return to such a writ of *certiorari*, the court or judge, before which or whom it is returnable, must proceed as upon a return to a writ of *habeas corpus*, and must hear the proofs of the parties in support of and against the return.

The use of the writ of *certiorari* is to enable the proceeding to continue without the presence of the prisoner, and the form of the writ is given by and under section 2022. The proceedings are the same as under the writ of *habeas corpus*.

§ 2043. If it appears that the prisoner is unlawfully imprisoned or restrained in his liberty, the court or judge must make a final order, discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, the court or judge must make a final order, dismissing the proceedings.

In case of an infant, the court may either set it free from restraint

or commit to the proper custody. *People, ex rel., v. Kling*, 6 Barb. 366; *People, ex rel., v. Cooper*, 8 How. 288; *People, ex rel., v. Olmstead*, 27 Barb. 9. Otherwise an order of discharge only is proper. *People, ex rel., v. Porter*, 1 Duer, 709. In *Ex parte Badgley*, 7 Cow. 472, a prisoner was discharged from one only of two causes of imprisonment on which he was held.

§ 2044. Notwithstanding a writ of *certiorari* has been issued or returned as prescribed in this article, the court or judge, before which or whom it is returnable, may issue a writ of *habeas corpus*, which is, in all respects, subject to the foregoing provisions of this article, relating to the latter writ. If the court or judge refuses a writ of *certiorari*, or, upon the return thereof, refuses to discharge the prisoner, the latter may claim, and is entitled to, the writ of *habeas corpus*, as prescribed in this article.

§ 2045. If, upon the return to a writ of *certiorari*, issued as prescribed in this article, it appears that the person imprisoned or detained is entitled to be bailed, the court or judge must make a final order, fixing the sum in which he is to be admitted to bail; specifying the court, and the term thereof, at which he is required to appear; and directing his discharge, upon bail being given accordingly, as required by law. If sufficient bail is immediately offered, the court or judge must take it, otherwise bail may be given afterward as prescribed in the next section.

A relator on *habeas corpus* who is remanded to custody on a bench warrant, and desires a stay pending an appeal to the Court of Appeals, must himself personally execute the recognizance within the jurisdiction of the court. *People, ex rel. Sherwin, v. Mead*, 64 How. 252.

Precedent for Order to Admit to Bail.

In the Matter of the Application of
Richard Stokes for a Writ of *Habeas*
Corpus.

The above-named petitioner, having sued out a writ of *habeas corpus*, and writ of *certiorari* to review detention, and a return thereto having been made, and such return having been traversed by the said petitioner and a hearing having this day been had, and it appearing that the said Richard Stokes is entitled to be admitted to bail: Now, after hearing John F. Cloonan for the petitioner, and J. N. Vanderlyn, Esq., opposed, it is ordered that the said Richard Stokes be discharged from imprisonment on his entering into a recognizance, with two sufficient sureties, to the people of the State of New York, to appear at the next Court of Sessions to be held in and for the county of Ulster, at the court-house in the city of Kingston, on the 10th day of June next, and not to depart the court without leave, and to abide the judgment and order of the court.

Dated May 2, 1887.

WILLIAM S. KENYON,
County Judge.

§ 2046. Upon the production of the order, or, if it was made by a court, of a

certified copy thereof, to a justice of the Supreme Court, or to the county judge or special county judge of the county, or to a judge of a superior city court of the city where the prisoner is detained, the judge must take the recognizance of the prisoner, with two sureties, in the sum so fixed, conditioned for the appearance of the prisoner, as prescribed in the order. Each person offering himself as a surety must show by his oath, to the satisfaction of the judge, that he is a householder in the county and worth twice the sum in which he is required to be bound, over and above all demands against him. It is not necessary that the prisoner should appear in person before the judge to acknowledge the recognizance; but it may be acknowledged by the prisoner and certified in like manner as a deed to be recorded in the county.

§ 2047. The judge must immediately file the recognizance with the clerk of the court before which the prisoner is bound to appear. He must also make a certificate upon the order, or the certified copy thereof, to the effect that it has been complied with. Upon production of the certificate the prisoner is entitled to his discharge from imprisonment, for any cause stated in the return to the *certiorari*.

§ 2048. The writ of discharge is abolished. A final order to discharge a prisoner, made as prescribed in this article, may be served in like manner as an injunction order, and when so served, it may be enforced in the same manner as a final judgment in a civil action, except where special provision for its enforcement is otherwise made in this act. Where such an order directs a discharge, upon giving bail, the service thereof is not complete until service of the certificate, or other proof prescribed by law, showing that bail has been given as required thereby.

§ 2049. Obedience to a final order to discharge a prisoner, made as prescribed in this article, may be enforced by the court which, or the judge who, made the same, by attachment, as for a neglect to make a return to a writ of *habeas corpus*, and with like effect. A person guilty of such disobedience forfeits to the prisoner aggrieved one thousand two hundred and fifty dollars, in addition to the damages which the latter sustains.

See form of attachment and statement of method of obtaining same under Contempt, section 1266, *et seq.*

§ 2050. A prisoner who has been discharged by a final order, made upon a writ of *habeas corpus* or *certiorari*, issued as prescribed in this article, shall not be again imprisoned, restrained or kept in custody for the same cause. But it is not deemed to be the same cause in either of the following cases:

1. Where he has been discharged from a commitment on a criminal charge, and is afterward committed for the same offense, by the lawful order or other mandate of the court wherein he was bound by recognizance to appear, or in which he has been indicted or convicted for the same offense.

2. Where he has been discharged in a criminal cause for defect of proof, or for a material defect in the commitment, and is afterward arrested on sufficient proof and committed by a lawful mandate for the same offense.

3. Where he has been discharged, in a civil action or special proceeding, for an illegality in the judgment, final order or other mandate, as prescribed in this article, and is afterward imprisoned by virtue of a lawful judgment, final order or other mandate, for the same cause of action.

4. Where he has been discharged, in a civil action or special proceeding, from imprisonment by virtue of an order of arrest, and is afterward taken in execution, or other final process, in the same action or special proceeding, or arrested in another action or special proceeding, after the first was discontinued.

If the officer has no jurisdiction the order made on the writ is void and the prisoner may be rearrested. *Spalding v. People*, 7 Hill, 301; *Cable v. Cooper*, 15 Johns. 152. It is held if the order is valid and the prisoner is rearrested he may again have the writ. *People, ex rel., v. Kelly*, 1 Abb. (N. S.) 432.

§ 2051. If a court, or a judge, or any other person, in the execution of a judgment, order or other mandate, or otherwise, knowingly violates, causes to be violated, or assists in the violation of the last section, he, or if the act or omission was that of a court, each member of the court assenting thereto, forfeits to the prisoner aggrieved one thousand two hundred and fifty dollars. He is also guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both, in the discretion of the court.

§ 2052. Any one having in his custody or under his power a person entitled to a writ of *habeas corpus* or a writ of *certiorari*, as prescribed in this article, or a person for whose relief a writ of *habeas corpus* or a writ of *certiorari* has been duly issued, as prescribed in this article, who, with intent to elude the service of the writ, or to avoid the effect thereof, transfers the prisoner to the custody, or places him under the power or control of another, or conceals him, or changes the place of his confinement, is guilty of a misdemeanor, and, upon conviction thereof, shall be punished as specified in the last section.

With reference for liability for damages, see *Rising v. Dodge*, 2 Duer, 42.

§ 2053. A person who knowingly assists in the violation of the last section is guilty of a misdemeanor, and, upon conviction thereof, shall be punished as specified in the last section but one.

§ 2054. Where it appears, by proof satisfactory to a court or judge authorized to grant either writ, that a person is held in unlawful confinement or custody, and that there is good reason to believe that he will be carried out of the State, or suffer irreparable injury, before he can be relieved by a writ of *habeas corpus* or a writ of *certiorari*, the court or judge must issue a warrant, reciting the facts, directed to a particular sheriff, or generally to any sheriff or constable, or to a person specially designated therein, and commanding him to take and forthwith to bring before the court or judge, the prisoner, to be dealt with according to law. If the warrant is issued by a court, it must be under the seal thereof; if by a judge, it must be under his hand.

Precedent for Petition for Warrant to Bring up Prisoner.

SUPREME COURT.

In the Matter of the Application of
Alonzo Freeman for a Writ of *Certio-*
rari to bring up the body of Henry
Freeman, an infant.

The petition of Alonzo Freeman shows to the court that heretofore on his application a writ of *habeas corpus* issued out of this court,

commanding Celia Freeman to bring up the body of Henry Freeman, an infant; that service of such process was duly made, and that Celia Freeman threatens to leave the State of New York, and remove permanently with said Henry Freeman to the State of Connecticut. That said Celia Freeman obtained the custody of the said infant by forcibly taking him from the custody of his grandmother, and committed an assault in so doing. That she has informed several persons of her intention to leave the State, and has made preparations for her departure before the return day of said writ, and this petitioner has good reason to believe that she will remove said infant from the State before such return day. Wherefore your petitioner prays that a warrant issue pursuant to the provisions of section 2054 of the Code of Civil Procedure, to bring up the said Henry Freeman before this court to be dealt with according to law.

ALONZO FREEMAN.

(Add verification.)

§ 2055. Where the proof, specified in the last section, is also sufficient to justify an arrest of the person having the prisoner in his custody, as for a criminal offense, committed in taking or detaining him, the warrant must also contain a direction to arrest that person, for the offense.

Precedent for Warrant.

The People of the State of New York, to the Sheriff of the County of Ulster:

It appearing by the petition of Alonzo Freeman this day read and filed, that there is good reason to believe that Celia Freeman is about to remove the body of Henry Freeman, an infant, to the State of Connecticut, and out of the State of New York, before the return day of a writ of *habeas corpus* heretofore issued out of this court, commanding said Celia Freeman to bring up the said Henry Freeman: We do, therefore, command you to bring forthwith before this court the body of the said Henry Freeman, to be dealt with according to law, and also the body of the said Celia Freeman.

In witness whereof I have hereunto set my hand and caused [L. S.] the seal of the court to be affixed.

A. B. PARKER,

Justice Supreme Court.

See *People v. Frink*, 4 State Rep. 162; S. C., 41 Hun, 188.

It is held in a number of cases that the principle of *res adjudicata* applies to the writ. *People v. Burtnett*, 13 Abb. 8; *People v. Orser*, 12 How. 550; *Matter of Thomas*, 10 Abb. (N. S.) 114. And that it matters not that the relator is different if the same question is up for decision between the same parties. *Matter of Da Costa*, 1 Park. Cr. 129. But see *People v. Brady*, 56 N. Y. 182, which holds the contrary, and is now the rule in this State.

§ 2056. The officer or other person, to whom the warrant is directed and delivered, must execute it by bringing the prisoner therein named, and also, if so commanded in the warrant, the person who detains him, before the court or judge issuing it; and thereupon the person detaining the prisoner must make a return, in like manner, and the like proceedings must be taken, as if a writ of *habeas corpus* had been issued in the first instance.

§ 2057. If the person, having the prisoner in his custody, is brought before the court or judge, as for a criminal offense, he is entitled to be examined, and must be committed, bailed, or discharged, by the court or judge, as in any other criminal case of the same nature.

§ 2058. An appeal may be taken from an order refusing to grant a writ of *habeas corpus*, or a writ of *certiorari*, as prescribed in this article, or from a final order, made upon the return of such a writ to discharge or remand a prisoner, or to dismiss the proceedings. Where a final order is made to discharge a prisoner, upon his giving bail, an appeal therefrom may be taken, before bail is given; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie, from an order of the court or judge, before which or whom the writ was made returnable, except as prescribed in this section.

An order directing a further return to a writ of *habeas corpus* or *certiorari* issued under section 2015 to inquire into the cause of the detention of a person is not appealable and the General Term has no authority to review it. *Matter of Larson*, 96 N. Y. 381.

§ 2059. An appeal from a final order, discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order, may be taken, in the name of the people, by the attorney-general or the district attorney.

The appeal is taken in the usual form and proceeds as on other appeals. In case where the provisions of section 2038 apply the title of the cause on appeal may be changed by the addition of the name of the interested party.

In *People of The State of New York, ex rel. Sinkler, v. Terry*, 5 State Rep. 120, it was held that the appeal having been taken to the General Term in the name of the people, under § 2059, and the order of the lower court affirmed, the costs should be paid by the county.

§ 2060. Where a prisoner, who stands charged, upon a criminal accusation, with a bailable offense, has perfected, or intends to take, an appeal from a final order dismissing the proceedings, remanding him or otherwise refusing to discharge him, made as prescribed in this article, the court or judge, upon his application, either before or after the final order, must, upon such notice to the district attorney as the court or judge thinks proper, make an order, fixing the sum in which the applicant shall be admitted to bail, pending the appeal; and thereupon, when his appeal is perfected, he must be admitted to bail accordingly.

Order fixing Bail.

At a Special Term of the Supreme Court held in and for the county of Ulster, at the court-house in Kingston, on the 12th day of March, 1887:

Present—Hon. Alton B. Parker, *Justice*.

In the Matter of the Application of Patrick Larkin for a Writ of a *Habeas Corpus*.

A writ of *habeas corpus* having been heretofore issued on the appli-

cation of Patrick Larkin, and the said Patrick Larkin having been brought before the court, pursuant to the command of said writ and after hearing had, the proceedings on said writ having been dismissed by final order and the said Patrick Larkin remanded: Now, after hearing Charles A. Fowler, Esq., for the prisoner, on behalf of the application, and J. N. Vanderlyn, district attorney, opposed, and it appearing that the said Larkin is accused of a bailable offense, to-wit, the crime of manslaughter, and that the said Larkin has taken an appeal from the said final order dismissing the proceedings on *habeas corpus*, it is ordered that the said Patrick Larkin be admitted to bail pending such appeal in the sum of \$2,000, and that he be discharged upon perfecting such bail.

Indorsed:—"Granted at within term."

J. D. WURTS, *Clerk*.

§ 2061. The recognizance for that purpose must be conditioned, that the prisoner will appear, at a General Term of the appellate court to be held at a time and place designated in the order, and abide by and perform the judgment or order of the appellate court. It must be taken and approved by a justice of the Supreme Court, or by the court or judge from whose order the appeal is taken, or by the county judge of the county in which the order was made, or in the city of New York, by a judge of the Court of Common Pleas for that city and county. In all other respects, the proceedings are the same as prescribed in this article, where it appears, upon the return of a writ of *certiorari*, that the prisoner is entitled to be admitted to bail.

Precedent for Recognizance on Appeal from Order denying Writ.

COUNTY OF ULSTER, ss.:

Be it remembered, that on the 12th day of March, Patrick Larkin, John Larkin, merchant, and James Larkin, mechanic, all of the city of Kingston, in the county of Ulster, personally appeared before the Supreme Court at a Special Term thereof, held in the city of Kingston, and severally and respectively acknowledged themselves indebted to the people of the State of New York in the sum of \$2,000, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

WHEREAS, The above-bounden Patrick Larkin is in the custody of the sheriff of Ulster county, under a commitment made by the recorder of the city of Kingston, on a charge of manslaughter; and

WHEREAS, An application has been made on behalf of said Patrick Larkin for a writ of *habeas corpus*, and the prisoner has been brought up and a hearing had and the proceedings dismissed, and said Patrick Larkin remanded; and

WHEREAS, An appeal has been taken by him from said final order remanding the proceedings on *habeas corpus*, and an order granted admitting him to bail pending said appeal: Now, therefore, the condition of this recognizance is such that if the said Patrick Larkin shall appear at a General Term of the Supreme Court, to be held at the City Hall in the city of Albany, on the 3d day of May, 1887, and abide by and perform the judgment of the appellate court on said appeal, then

this recognizance to be void, otherwise to remain in full force and effect.

(Signatures.)

Taken, subscribed and acknowledged, and approved }
before me this 12th day of March, 1887. }

A. B. PARKER,
Justice Supreme Court.

§ 2062. Where a prisoner, who stands charged with an offense, specified in the last section, has perfected an appeal, to the Court of Appeals, from a final order of the Supreme Court, or of a superior city court, affirming an order refusing his discharge, or reversing an order granting his discharge; the court, from whose order the appeal is taken, or a judge thereof, must, upon his application, admit him to bail, as prescribed in the last section; except that the recognizance must be conditioned to appear, at a General Term of the court from which the appeal is taken, to abide by and perform its judgment or order, made after the determination of the appeal.

§ 2063. Where the sum, in which a prisoner shall be admitted to bail, has been fixed, as prescribed in either of the last two sections, he must remain in the custody of the sheriff of the county in which he then is, until he is admitted to bail, as therein prescribed; or, if he does not give the requisite bail, until the time to appeal has expired, or the appeal is disposed of, and the further direction of the court, made thereupon.

§ 2064. Where no order or other direction of the court, relating to the disposition of the prisoner, is made at the term specified in a recognizance, given as prescribed in section two thousand and sixty-one or section two thousand and sixty-two of this act, the matter is deemed adjourned, without an order to that effect, to the next General Term of the same court; or, in the Supreme Court, to the next General Term thereof to be held in the same department; and thereafter to each successive General Term, until such an order or direction is made. The prisoner is bound to attend at each successive General Term; and the recognizance is valid for his attendance accordingly, without any notice or other formal proceedings.

§ 2065. An officer or other person, who detains any one by virtue of a mandate, or other written authority, must, upon reasonable demand, and tender of his fees, deliver a copy thereof to any person who applies therefor, for the purpose of procuring a writ of *habeas corpus* or a writ of *certiorari*, in behalf of the prisoner. If he knowingly refuses so to do, he forfeits two hundred dollars to the prisoner.

§ 2066. Except as otherwise expressly prescribed by statute, the provisions of this article apply to and regulate the proceedings upon every common-law or statutory writ of *habeas corpus*, as far as they are applicable; and the authority of a court or a judge, to grant such a writ, or to proceed thereupon, by statute or the common law, must be exercised in conformity to this article, in any case therein provided for.

When husband and wife are living separately, not being divorced, under the provision of 2 R. S. 148, § 1, the writ may be sued out by the wife to obtain control of a minor child.

In such case writ must be issued by the court, a judge has no jurisdiction. *People, ex rel., v. Osborne*, 6 Civ. Pro. 299. 2 R. S. 44, § 15, provides that an insolvent debtor committed for con-

tempt shall not be discharged till he answers. By chapter 4, Laws of 1847, it is provided that a prisoner confined in one county may be taken to another for trial for another offense. These provisions are still in force.

Proceedings on *habeas corpus* are special proceedings, costs are allowable in the discretion of the court. *Matter of Barnett*, 11 Hun, 468; Code, § 3240. As to amount of costs allowed on appeal, see *People v. Terry*, 5 State Rep. 120.

The case of *People, ex rel. Liscomb, v. Tweed*, 60 N. Y. 559, reviews fully the history of the writ, and discusses its importance, and lays down the principles upon which it is granted. It has, by construing the *habeas corpus* act liberally, enlarged the scope of the writ and defined its application. The able and exhaustive opinions of Judge Allen and Judge Rapallo need to be consulted in order to obtain the scope of the decision, reviewing, as they do, very many cases, and defining the law applicable to the writ.

Judge Allen says at page 591: "If the punishment for the offense is fixed by statute, a judgment in excess of the statutory limit is void for the excess, as we have seen by the adjudged cases. A party held by virtue of judgments thus pronounced and, therefore, void for want of jurisdiction is not put to his writ of error, but may be released by *habeas corpus*."

As the doctrine held in that case was regarded by the profession as extending the province of *habeas corpus*, the court in *People, ex rel. Woolf, v. Jacobs*, 66 N. Y. 10, defined the terms of the decision in this language: "In respect to the question of the remedy by *habeas corpus*, what is decided in that case is that where the punishment for a crime is defined and limited by statute, and the court has imposed a sentence to the full limit allowed by statute, it has exhausted its authority in the case, and that, if it proceeds to impose further additional sentences, the latter are void and afford no justification for the detention of the prisoner after he has served out the full term of imprisonment which the statute empowered the court to enforce upon him, and that he is then entitled to his discharge on *habeas corpus*."

People, ex rel. Devoe, v. Kelly, 97 N. Y. 215, followed these decisions, holding that where the conviction is valid the relator should not be discharged, but remanded for proper sentence. See, also, *People, ex rel. Trainor, v. Baker*, 89 N. Y. 460. And in *People, ex rel. Stokes, v. Risely*, 38 Hun, 282, it is held that "final judgment must be that of a competent tribunal to pronounce the

judgment, and where the competency to pronounce it is exhausted or never existed, it does not come within the definition of the final judgment, as to which the *habeas corpus* is ineffective."

In that case it was held that where a court had pronounced judgment beyond its authority and jurisdiction, the writ would lie and the prisoner be discharged since there was no court competent to sentence. See, also, *People v. Warden, etc.*, 100 N. Y. 20, holding same principle.

From these cases it will be observed that, together with the compact statute enacted by the Code, they constitute an epitome of the law and practice as to the writ, and in all cases where the release of a prisoner is sought, they will be found decidedly in point.

Appeal.—On appeal to the General Term from the order of the Special Term dismissing a writ of *habeas corpus*, requiring defendant to produce an infant, the order was reversed and proceedings remitted to the special term for a new hearing. On such hearing an order was made remanding the infant to the custody of relator. A motion was thereupon made to set aside such order on the ground that the Special Term had no jurisdiction to make it, which motion was denied. *Held*, that the order thereon was not reviewable in the Court of Appeals, if without jurisdiction it was within the discretion of the court to set it aside, or leave the defendant to set up its invalidity when an attempt should be made to enforce it. *People, ex rel. Brush, v. Brown*, 103 N. Y. 684.

CHAPTER IV.

THE WRIT OF MANDAMUS.

The writ of *mandamus* is an ancient common-law writ, and is described by the English authorities as a high prerogative writ, and issuing only out of the King's Bench. Blackstone, vol. 3, p. 110. In 1854, it was vested in all the superior English courts. *People, ex rel. McMahon, v. Board of Excise*, 3 State Rep. 253.

It was defined by Lord Mansfield in *Res v. Barker*, Burr. 1267, as a writ "to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court." It has been modified to a considerable extent by modern practice, and is thus described by a leading American text-writer.

"The modern writ of *mandamus* may be defined as a command issuing from a common-law court of competent jurisdiction in the name of the State or sovereign, directed to some corporation, officer or inferior court requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law." High on Extraordinary Remedies, 4. *Mandamus* is an extraordinary remedy, and the power to entertain it has been so exercised only in the past by the higher courts of common-law jurisdiction, where it properly belongs. *People, ex rel., v. Board of Excise*, 3 State Rep. 253. This writ it has often been said will not be granted in doubtful cases, but it is questionable whether this now means more than that there must be a clear, legal right to relief, and no other adequate remedy. In cases where it is applicable these considerations are the test to be applied. *People v. Thompson*, 25 Barb. 73.

The relator must have the right to the performance of some particular act or duty at the hands of the respondent, and the case must be one in which the law affords no adequate remedy to secure the enforcement of the right and the performance of the duty which it is sought to coerce. *People v. Supervisors of Greene*, 12 Barb. 217. And this subject to the restriction that this must be a right to have the act performed by some corporation, officer, or board, or by an inferior court. *Dunklin County v. District Co. Court*, 23 Mo. 449.

The writ is never granted except for public purposes and to command the execution of public duties. *Fish v. Weatherwax*, 2 Johns. Cas. 215; Bacon's Abridgment, title *Mandamus*. The general principles applicable to the writ are that it will not issue when it would be unavailing. *People v. Supervisors of Westchester*, 15 Barb. 607; *Colonial Life Ins. Co. v. Supervisors of New York*, 24 id. 166. It is never granted in anticipation of a refusal to act. High on Extraordinary Remedies, 14. While the existence of an adequate remedy at law will be ground for refusing the writ, the fact of the existence of an equitable remedy is not an objection. *People v. Mayor of New York*, 10 Wend. 395. *Mandamus* will sometimes lie against a municipal corporation when there is another remedy. *People v. Green*, 2 T. & C. 62. But it seems not when the remedy at law is adequate. *People v. Common Council*, 8 Week. Dig. 82. The practice under the Code of Civil Procedure was unsettled, being derived from the common law, and modified from time to time to meet new statutes. The proceedings up to the time of the Code of Procedure by this writ were comparatively rare, and by it no pro-

vision was made for rules of practice, and great confusion arose after its enactment as to the proper method of procedure, it being questioned for a long time whether it was an action or special proceeding; and it was in *People v. Lewis*, 28 How. Pr. 470, held to be an action, yet the procedure at common law was held applicable. It is now a Special Proceeding.

The codifiers, in framing the New Code, have devoted themselves exclusively to regulating the mode of procedure, and have made no attempt to define the cases in which the writ will lie. The power to issue the writ is confined to courts of general common-law jurisdiction, and these courts will be governed in administering relief by the writ by the same conditions and limitations as existed at common law, and will not issue the writ where another adequate remedy is provided by law. *Kimball v. Union Water Co.*, 44 Cal. 173. The writ is most frequently used to compel public officers to perform some act in the line of their duty and is appropriate to that function. *United States v. Commissioners, etc.*; High on Extraordinary Remedies, 32. There must, however, be such officers in being, and it will not run against officers who have never qualified, or who are *functus officio*, or where their term has expired. *State v. Beloit*, 21 Wis. 280; *State v. Waterman*, 5 Nev. 323; *Mason v. School District*, 20 Vt. 487. But, when it is a duty which would be incumbent on their successors, the fact that the term is about to expire is no answer. *People v. Collins*, 19 Wend. 56; *People v. Champion*, 16 Johns. 61. The writ will only be granted where there is a discretion to be exercised for the purpose of putting the officer, court or board in motion, but will not control his or its action, or dictate the decision to be made or judgment to be rendered. *People v. Brennan*, 39 Barb. 651; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Contracting Board*, 27 id. 378; *People v. Booth*, 49 Barb. 31; *People v. Common Council*, 78 N. Y. 33; *People v. Canal Appraisers*, 73 id. 443; *People v. Fairman*, 91 id. 385. In *People, ex rel., v. Baker*, 14 Abb. 19, many of the points above noted are discussed and passed upon. Whenever a party has a legal right and is entitled to a remedy, and the court, official, or corporation, whose duty it is to act, refuses to do so, the writ lies. *People, ex rel., v. Clerk Marine Court*, 3 Abb. 309, Court of Appeals; *People, ex rel., v. Hayt*, 66 N. Y. 606; *Adriance v. Supervisors*, 12 How. 224; *People, ex rel., v. Taylor*, 1 Abb. (N. S.) 200; *People, ex rel., v. St. Patrick's Cathedral*, 10 Week. Dig. 124; *People v. Wendell*, 71 N. Y. 171; *People v. Thompson*, 25 Barb. 73; *People v.*

Green, 63 id. 390; *People v. Martin*, 62 id. 570; *People v. Inspectors*, 44 How. 322; *People v. Haws*, 12 Abb. 204; *People v. Hawkins*, 46 N. Y. 9.

The writ is granted where remedy by action is doubtful. *People v. Havemeyer*, 16 Abb. (N. S.) 219; *People v. Supervisors*, 11 N. Y. 563; *People v. Green*, 58 id. 295; *People v. Steele*, 2 Barb. 417; *People v. Canal Board*, 13 id. 440; *Clark v. Miller*, 47 id. 38; 54 N. Y. 528. The granting of the writ has been in certain cases held to be entirely discretionary, and that no appeal lies to Court of Appeals from refusal in cases where it depends on discretion. *Van Rensselaer v. Sheriff*, 1 Cow. 501; *People, ex rel., v. Supervisors*, 15 Barb. 607; *People, ex rel., v. Dowling*, 55 id. 197; *People, ex rel., v. Common Council*, 52 How. 346; *People, ex rel., v. Booth*, 49 Barb. 31; *People, ex rel., v. Ferris*, 76 N. Y. 326; *People, ex rel., v. Campbell*, 72 id. 496; *Sage v. Railroad Co.*, 70 id. 220; *People v. Dowling*, 37 How. 394; *People v. Aslen*, 7 Week. Dig. 411. Where a party has a sufficient remedy at law against a public officer, the court is not absolutely bound to grant a writ of *mandamus*, but it may in its discretion refuse, and this discretion is not reviewable by the Court of Appeals. *People, ex rel., v. Thompson*, 99 N. Y. 641, following *People v. Campbell*, 72 id. 496. But while it is not a writ of right, this discretion is to be exercised and is to be regulated and controlled by sound legal principles. *Fish v. Weatherwax*, 2 Johns. Cas. 215; *People, ex rel., v. Common Council*, 9 Week. Dig. 43, Court of Appeals; S. C., 78 N. Y. 56. There must be a clear legal right and no other legal remedy. *People v. Supervisors of Chenango*, 1 Kern. 563; *People v. Supervisors of Greene*, 12 Barb. 217; *People v. Canal Board*, 13 id. 444; *People v. Croton Board*, 26 id. 240; *People v. Supervisors of Richmond*, 21 How. 335; *People v. Corporation of Brooklyn*, 1 Wend. 324; *People v. Supervisors of Columbia*, 10 id. 363; *People v. Mayor of New York*, id. 397; *People v. Supervisors of Chenango*, 11 N. Y. 563; *People v. Easton*, 13 Abb. (N. S.) 159; *People v. Fay*, 3 Lans. 398; *People, ex rel. Badgley, v. Supervisors of Greene*, 1 Hun, 1; *People v. Auditors of Shawangunk*, 1 How. (N. S.) 224; *People, ex rel., v. Supervisors*, 18 Abb. 8; *People, ex rel., v. Coffin*, 7 Hun, 608; *People, ex rel., v. Board of Apportionment*, 64 N. Y. 627; *People, ex rel., v. Campbell*, 72 id. 496; *Clark v. Miller*, 54 id. 528; *People, ex rel., v. Green*, 11 Hun, 56; *People, ex rel., v. Hawkins*, 46 N. Y. 9. The writ is said to lie to corpo-

rations and municipal officers, although there is a remedy by action. *Buck v. City of Lockport*, 6 Lans. 251; *People, ex rel., v. Steele*, 2 Barb. 397; *People, ex rel., v. Myer*, 10 Wend. 393; *McCullough v. Meyer*, 23 id. 458. But see *People v. Board of Supervisors of Chenango*, 11 N. Y. 573. It will not be awarded where there is a remedy by action. *Ex parte The Firemen's Ins. Co.*, 6 Hill, 213; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *People, ex rel., v. Coal Co.*, 10 How. 544; *In the Matter of Boice*, 2 Cow. 444; *People v. The Mayor of New York City*, 25 Wend. 680; *People v. The Supervisors of Chenango Co.*, 1 Kern. 563; *People v. The President of Brooklyn*, 1 Wend. 318; *People v. Tioga Common Pleas*, 19 id. 73; S. C., 13 Abb. 374; *People v. Fernando Wood, Mayor, etc.*, 35 Barb. 653; *People v. Stevens*, 5 Hill, 616; *People v. Dikeman*, 7 How. 124; *People v. Green*, 11 Hun, 61; *People v. French*, 24 id. 263. Except in special cases. *People v. Supervisors*, 70 N. Y. 28. As to how far this is true when the writ is directed to ministerial officers and corporations, see *McCullough v. Mayor of Brooklyn*, 23 Wend. 458; *People v. Steele*, 2 Barb. 398, and *People v. Supervisors of Chenango*, 1 Kern. 573. The writ will not issue to compel an act requiring discretion or to review an act requiring discretion. *People v. Common Council*, 78 N. Y. 33; *People v. Supervisors of Westchester*, 12 Barb. 446; *Ex parte Baily*, 2 Cow. 479; *Ex parte Bassett*, id. 458; *People v. N. Y. Common Pleas*, 19 Wend. 113; *People v. Contracting Board*, 27 N. Y. 378; *People v. Booth*, 49 Barb. 31; *People v. Taylor*, 1 Abb. (N. S.) 200; *Hutchinson v. Commissioners*, 25 Wend. 692; *People, ex rel., v. Leonard*, 74 N. Y. 443; *Bearns v. Gould*, 77 id. 95; *People v. Common Council*, 20 Alb. L. J. 269; *People v. Common Council*, 9 Week. Dig. 68. It will not be issued where there is doubt as to the right of the claimant. *People v. West Troy*, 25 Hun, 179. It will not lie to review the discretion of a railroad company in failing to furnish suitable passenger and freight-houses at a station, even where facts appear which show the duty to be imperative. *People v. N. Y. & L. E. R. R. Co.*, 5 State Rep. 551; reversing 40 Hun, 571. When the act, the doing of which is sought to be compelled, is final, the right to have the act performed may be inquired into. *People, ex rel., v. Canal Appraisers*, 13 Hun, 64; 73 N. Y. 443. It is not discretionary for supervisors to refuse to levy any sum where the liability is plain, and no dispute as to amount. *People, ex rel., v. Supervisors of Delaware*, 9 Abb. (N. S.) 408; 45 N. Y. 196; same principle,

People v. Green, 66 Barb. 630. It has been held the writ will not always be granted, though there is no other remedy. *Ex parte Ostrander*, 1 Denio, 679; *People v. Dowling*, 55 Barb. 197. But it may issue, though there is a remedy by *certiorari*. *People, ex rel., v. Taylor*, 30 Hun, 78. It will not be granted to enforce action under a statute so badly drawn it cannot be enforced, or where it is of doubtful constitutionality. *People v. Robinson*, 14 Hun, 226; 76 N. Y. 422; *People v. Canal Board*, 4 Lans. 272. Where there is a remedy by appeal, writ will not lie. *People v. Coffin*, 7 Hun, 603. Or by action. *People v. Inspectors*, 44 How. 322; *People v. Lott*, 41 N. Y. 408. If too much is asked, the rule has been laid down that the writ will be denied. *People v. Cady*, 2 Hun, 224; *People v. Port Jervis*, 8 Week. Dig. 243; *People v. Green*, 64 Barb. 162. It was held under the old Code that the writ would be refused when there had been great delay in the application. *People v. Tremain*, 29 Barb. 96; *People v. Taylor*, 30 How. 78; *People v. Common Council*, 52 id. 346. See *People v. Cooper*, 24 Hun, 337. But some injury from the delay should be shown to prevent the issue of the writ. *People v. Common Council*, 9 Week. Dig. 43; S. C., 78 N. Y. 56. But under the present Code, it has been held at Special Term that the time under which the writ may be asked is the same as limitation of an action. *People v. Beach*, 3 Civ. Pro. 180; 12 Abb. (N. S.) 156. The writ will be refused where great delay has resulted in payment of moneys being made to another claimant. *People v. O'Keefe*, 17 Week. Dig. 536. Six years is the limitation of time within which the writ must be asked. *People v. French*, 31 Hun, 617; *People v. Police Comm'rs*, N. Y. Daily Reg., Aug. 2, 1883. But the proper officer may be compelled to accept payment of taxes by *mandamus*, and the statute of limitation is no bar. *People v. Cady*, 51 N. Y. Super. 316. *Mandamus* should not be granted where the defendant has been legally enjoined from doing what the relator seeks to have done. *People v. West Troy*, 25 Hun, 179; *People v. Supervisors of Ulster*, 30 id. 146. Every citizen has the right to compel public officers to execute the laws of the State, and citizens can compel a board of health to organize. *People v. Daly*, 37 Hun, 461. The court will only grant the writ of *mandamus* on the attorney-general's application, when it is able to see, from the undisputed facts alleged, that its issuance is necessary to protect some public right or secure some public interest. Where private interests only are involved, the interested parties should be the relators. *People v. Rome, etc.*,

R. R. Co., 3 State Rep. 39; 103 N. Y. 95. And it is only where private redress is had that the relator must show an interest, as a citizen and tax payer may compel the common council to follow a statute. *People v. Common Council of Buffalo*, 16 Abb. N. C. 96. Where a *mandamus* is asked to compel repayment of taxes illegally collected, it is incumbent on the relator to show taxes invalid. *People v. Brinkerhoff*, 20 Week. Dig. 391. And whatever is required to be done by relator as a condition precedent to the right demanded must be shown affirmatively to have been done. *People v. Hayt*, 66 N. Y. 606. The writ must be addressed to the person, body or board who is obliged by law to execute it, or whose duty it is to do the thing required. *People v. Common Council*, 3 Keyes, 81; *People v. Police Comm'rs*, 8 Abb. 41; *People v. Throop*, 12 Wend. 183. If it is desired to convene a board of supervisors, the writ so ordering may be directed to the chairman and clerk. *People v. Brinkerhoff*, 68 N. Y. 259. *Mandamus* to compel payment by the board of education of the city of New York must be directed (before chap. 210, Laws of 1882) to the president and clerk. *People v. Neilson*, 5 T. & C. 367. Where a board is not incorporated the writ should be directed to the individuals composing it. *People v. Civil Service Board*, 17 Abb. N. C. 64; affirmed, 41 Hun, 287.

To State officers.—The writ will lie to comptroller to perform a statutory duty. *People v. Allen*, 42 N. Y. 404. But where the comptroller has refused an application to cancel a sale of land for taxes upon the ground that the sale was regular, he cannot be compelled by *mandamus* to reach a different conclusion. *People, ex rel., v. Chapin*, 3 State Rep. 38; 103 N. Y. 635; affirming 39 Hun, 230. The remedy, however, *against* the comptroller by a party aggrieved as to cancellation of taxes is by *certiorari* and not by *mandamus*. *People v. Chapin*, 39 Hun, 230. The writ lies to the secretary of state. *People v. Nelson*, 3 Lans. 394; 46 N. Y. 477; *People v. Beach*, 57 How. 337. Also to the treasurer. *People v. Bristol*, 1 Lans. 45. And to the attorney-general. *People v. Tremain*, 17 How. 10. See *id.* 142. Also to the auditor to issue a draft. *People v. Thayer*, 63 N. Y. 348; *People v. Schuyler*, 79 *id.* 181; *People v. Thayer*, 4 Hun, 798. To compel canal appraisers to appraise. *Ex parte Jennings*, 6 Cow. 518. To commissioners to award contract. *People v. Contracting Board*, 46 Barb. 254. To superintendent of insurance department. *Matter of N. A. Ins. Co.*, 9 Week. Dig. 478, Court of Appeals. It runs against auditor of canal department.

People v. Bell, 38 N. Y. 386. To compel canal appraisers to make return on appeal. *People v. Canal Appraisers*, 73 N. Y. 443. It does not lie to compel award of contract when it has been, although wrongfully, awarded to another. *People v. Contracting Board*, 27 N. Y. 378. Or to compel award to lowest bidder when his bid is informal. *Weed v. Beach*, 56 How. 470. The writ was set aside as improperly granted against superintendent of insurance. *People v. Chapman*, 64 N. Y. 557. And refused to militia officer against governor. *People v. Scrugham*, 25 Barb. 216. Writ does not lie to compel attorney-general to bring suit. *People v. Fairchild*, 67 N. Y. 334.

To county officers.—*Mandamus* will issue to county treasurer to pay a valid audit by supervisors. *People v. Stout*, 23 Barb. 338; *People v. Edmonds*, 19 id. 468; *People v. Edmunds*, 15 id. 529; *People v. Fitzgerald*, 54 How. 1; *People v. Earle*, 16 Abb. (N. S.) 64. See *Healey v. Dudley*, 5 Lans. 115; *People v. Starr*, 55 How. 388. Or to issue warrant for collection of tax. *People v. Halsey*, 37 N. Y. 344. But not where the supervisors had no jurisdiction to audit. *People v. Lawrence*, 6 Hill, 244. Or where a portion of claim is fraudulent. *People v. Wendell*, 71 N. Y. 171. Nor a claim for which creditor has already accepted obligation of third party as payment. *People v. Cromwell*, 102 N. Y. 477. It will issue to compel county clerk to record a deed. *Ex parte Goodell*, 14 Johns. 325. To compel register to file a satisfaction-piece. *People v. Miner*, 37 Barb. 466; *People v. Sigel*, 46 How. 151. The obligation imposed upon a register of deeds to permit the books, maps and records of his office to be examined, is absolute in its character and may be enforced by *mandamus*. Citing *People v. Supervisors*, 64 N. Y. 600; *People v. Wendell*, 71 id. 171; *Fiedler v. Mead*, 24 id. 114. The register has, however, power to exercise his discretion as to the good order of the office and preservation of the records. To that extent his powers and duties are not subject to be interfered with or controlled by *mandamus*. *People, ex rel. Title Guaranty Co., v. Reilly*, 38 Hun, 429; citing *People, ex rel. German American, etc., Co., v. Richards*, 99 N. Y. 620. It is said a surrogate may be compelled to award letters to party entitled. *Case of Petullo*, 1 Tuck. 99. To compel sheriff to execute a deed. *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 501; *People v. Fleming*, 2 N. Y. 484; *People v. Beebe*, 1 Barb. 379. It will run against the commissioner of jurors in New York city to compel him to strike the name of a person not liable for jury duty from the list. *People v. Taylor*, 45

Barb. 129. To clerk of Marine Court, to compel him to issue execution on a judgment. *People v. Gale*, 22 Barb. 502; S. C., 3 Abb. Ct. App. 491. It will not be granted to interfere with discretion of excise commissioners. *Kelly v. Excise Commissioners*, 54 How. 327. *Mandamus* will issue in a proper case to compel a register to accept from owners arrears for taxes, even though an invalid sale has been made. *Clementi v. Jackson*, 92 N. Y. 591.

To board of supervisors and county canvassers.—The writ will not interfere with the discretion of supervisors where they have a discretion to exercise, but if they refuse to audit, for any sum, a legal claim, on the ground it is illegal, *mandamus* will issue. *People v. Supervisors*, 51 N. Y. 401; *Hall v. Supervisors*, 19 Johns. 259. It will lie to revoke an audit in excess of what is allowed by law. *People v. Supervisors*, 73 N. Y. 173. It will lie to compel board to audit claims of county officers. *People v. Supervisors*, 32 N. Y. 473; *People v. Supervisors*, 45 id. 196; *Bright v. Supervisors*, 18 Johns. 242. So to compel action as to highway damages. *People v. Supervisors*, 20 N. Y. 252; *People v. Supervisors*, 4 Barb. 64. So as to issuing warrant for military tax. *People v. Supervisors*, 8 N. Y. 317. Also to compel board to obey order of County Court, as to correction of amount. *People v. Supervisors of Ulster*, 65 N. Y. 300. To compel repayment of taxes on property assessed in two towns. *People v. Supervisors*, 85 N. Y. 612. To compel supervisors to strike out illegal levy. *People v. Supervisors*, 17 Week. Dig. 139. And to allow claim for repayment of taxes. *People v. Supervisors*, 51 N. Y. 401. To compel audit of an account where there is no discretion as to amount. *Boyce v. Supervisors*, 20 Barb. 294. The board may be compelled to reassemble and perform duties neglected at annual meeting. *People v. Supervisors*, 8 N. Y. 317. The board may be compelled to allow accounts of overseer of the poor. *People v. Supervisors*, 2 Cow. 530. To restore to the rolls property stricken off improperly. *People v. Supervisors*, 4 Hill, 20; S. C., 7 id. 504. To re-audit claim. *People v. Supervisors*, 12 Barb. 217. See *Osterhout v. Rigney*, 98 N. Y. 222. To cause taxes illegally assessed to be repaid. *People v. Supervisors*, 36 How. 1; *People v. Supervisors*, 51 N. Y. 401. *Mandamus* will lie to compel supervisors to designate papers to publish session laws. *People v. Supervisors of Greene*, 13 Abb. N. C. 421.

The writ will not issue to compel a board of supervisors to disallow a bill already audited when certificate has been issued therefor and passed to third party and bill is for services actually rendered.

The remedy is by *certiorari* in case audit was illegal. *People v. Supervisors of Greene*, 14 Abb. N. C. 29. Before the writ will lie to the board to assess against a town, a judgment against a commissioner of highways, it must appear that it is a valid claim against the town. *People v. Auditors of Esopus*, 74 N. Y. 311; *People v. Supervisors of Ulster*, 93 id. 397. Where a resolution was illegally declared lost and the board adjourned, it was held that *mandamus* directing the board to reassemble was sufficiently served on chairman and clerk. *People v. Neilson*, 5 T. & C. 367. An adjournment of a board of supervisors without making an audit is a sufficient refusal to justify *mandamus*. *People v. Supervisors of Richmond*, 20 N. Y. 253. *Mandamus* will not lie to compel supervisors to audit and allow the expense of publishing the terms of court, although the publishing was ordered by a judge of the court. *People v. Supervisors of Greene*, 15 Abb. N. C. 447; *People v. Supervisors*, 39 Hun, 299. It is no valid reason for refusing writ against county canvassers that the assembly is judge of the right to a seat of its own members. *People, ex rel. Deuchler, v. Canvassers of Wayne Co.*, 12 Abb. N. C. 78; S. C., 64 How. 334. Where there is reasonable ground to believe that the returns are not accurate, a *mandamus* will issue requiring county canvassers to remit such returns to the inspectors for such correction as they may see fit to make. *People, ex rel. Sanderson, v. Supervisors of Greene*, 12 Abb. N. C. 95. Canvassers at town meetings may be compelled by *mandamus* to canvass return. *People v. Schiellein*, 95 N. Y. 124. The writ will not lie to compel clerk of board to recognize relator as member of the board. *Matter of Gardner*, 68 N. Y. 467. Nor to compel the board to levy tax where there is right of action on town bonds. *Marsh v. Town of Little Valley*, 64 N. Y. 112. The writ will not lie to county canvassers to send back returns where there is no clerical error but a fraudulent alteration. *People v. Supervisors*, 58 How. 141. Nor to compel them to reassemble, having once acted. *People v. Supervisors*, 12 Barb. 217; distinguished, 95 N. Y. 133. But see contra, *People v. Canvassers*, 64 How. 201. Under Laws 1880, chapter 460, *mandamus* issued to county canvassers in *People v. Canvassers of Wayne*, 12 Abb. N. C. 77, and *Kortz v. Canvassers of Greene*, id. 84-95.

Municipal corporations and officers.—The writ will issue to the common council of a city compelling them to proceed in the matter of widening of a street. *People v. Common Council of Brooklyn*, 22 Barb. 404. Also to compel common council

to order an election to fill a vacancy. *People v. Common Council*, 77 N. Y. 503. But not to compel common council to confirm assessment of damages, there being another remedy. *People v. Brooklyn*, 1 Wend. 318. Nor to compel payment of expenses of opening street. *Bagley v. Green*, 1 Hun, 1. The writ will be awarded to compel the mayor to grant a license (*Ackley's Case*, 4 Abb. 35; *People v. Perry*, 13 Barb. 206), and to administer the oath of office to a person legally elected (*Ex parte Heath*, 3 Hill, 42; *Ackley's Case*, 4 Abb. 35); also to compel him to countersign a warrant. *People v. Opdyke*, 40 Barb. 306; *People v. Havemyer*, 3 Hun, 97; *People v. Havemyer*, 47 How. 494; *People v. Havemyer*, 16 Abb. (N. S.) 219. But not where the claimant is not entitled to his money. *People v. Tieman*, 30 Barb. 193; *People v. Booth*, 32 How. 17; *People v. Wood*, 13 Abb. 374. Where the proper authority has audited a claim, the comptroller and auditor may be directed to pay it. *People v. Earle*, 16 Abb. (N. S.) 64; *People v. Earle*, 47 How. 368; *People v. Earle*, 46 id. 308; *People v. Earle*, id. 267; *People v. Flagg*, 16 Barb. 503; *People v. Brennan*, 45 id. 457. It must, however, be a concededly valid claim. *People v. Board of Apportionment*, 3 Hun, 11; affirmed, 64 N. Y. 627. And there must be money in the treasury to meet it. *People v. Connelly*, 2 Abb. (N. S.) 315. But see *People v. Stout*, 23 Barb. 338; *People v. Haws*, 12 Abb. 192. But if the money has been wrongfully applied the writ will lie. *People v. Comptroller*, 77 N. Y. 45. But where the moneys sought to be reached have been paid to another claimant, and the fund to which it belonged is a special fund, *mandamus* will not lie. *People v. O'Keefe*, 100 N. Y. 572. It is held, however, in *People v. Board of Police*, 75 N. Y. 38 (distinguished, 96 id. 239, and 102 id. 18), that the treasurer of the board may be compelled by *mandamus* to draw on the comptroller for salary. See, also, *Swift v. Mayor*, 83 N. Y. 528. The writ has been issued to compel comptroller of New York city to pay salary to crier. *People v. Havemyer*, 47 How. 59. *Mandamus* lies to compel comptroller to pass on sufficiency of bonds of contractor. *People v. Green*, 50 How. 500; affirmed, 64 N. Y. 656; contra, *Matter of Moore*, cited in 8 Abb. Dig. 200, in note referring to 72 N. Y. 496. Not granted to compel comptroller to pay if he denies validity of contract. *People v. Green*, 66 Barb. 630. Comptroller ordered to sign warrant in case under charter city of Troy; see *People v. Crissey*, 91 N. Y. 616. The writ will issue to compel comptroller to pay deputy

clerk of Special Sessions. *People v. Green*, 58 N. Y. 295. But not to issue warrant till auditor has examined. *People v. Green*, 56 N. Y. 476; *People v. Brennan*, 18 Abb. 100. The writ will be awarded to compel auditor to designate proper paper. *People v. Brennan*, 39 Barb. 651. The writ will issue to compel city clerk to affix seal to contract. *People v. Connolly*, 2 Abb. (N. S.) 315. Assessors of New York city have been compelled to determine damages for street improvements. *People v. Assessors*, 53 How. 280. It will also run to police board to compel them to restore a member of the force. *People v. Board of Police*, 35 Barb. 527. A trial and discharge are, however, judicial acts. *People v. Police Commissioners*, 12 Abb. (N. S.) 181. And the writ will not be granted where relator has given up his position. *People v. Board*, 26 N. Y. 316. It will not compel board to pay full salary to sick policeman. *People v. French*, 24 Hun, 263. It seems that if the commissioners of police should wrongfully dismiss a member of the force because of an alleged conviction of a crime he would have his remedy by *mandamus* for restoration. *People v. French*, 102 N. Y. 583. It will run against a city board of auditors. *People v. Green*, 44 How. 201. But will not interfere with their discretion. *People v. Board of Apportionment*, 52 N. Y. 224; *People v. Cooper*, 24 Hun, 337. Issuing of a permit to remove night-soil will not be compelled by *mandamus*. *Matter of Wessel*, 13 Week. Dig. 185. The department of public buildings, having once acted, will not be compelled to submit the question passed on to examiners or to act favorably to relator. *People v. Esterbrook*, 26 Hun, 401. The writ will issue to compel principal of a public school in New York city to prepare pay-roll and certify to its correctness. *Matter of Gleese*, 50 N. Y. Super. 473. The writ will not lie to the police commissioners of New York city to compel them to pay salary to a member of the police force who has been removed, the right to the office must be tried on *certiorari*. *People v. French*, N. Y. Daily Register, June 11, 1884. A *mandamus* has been held to lie to compel merchants to remove goods from sidewalks when placed there by permission of the common council. *People v. Mayor*, N. Y. Daily Register, April 23, 1884. The act being illegal, the writ runs against the municipality. Where a city violates a contract, and proof is necessary to ascertain the amount of damages, the remedy is by action and not by *mandamus*. It is questioned whether the writ would lie after judgment to compel levy of the amount due. *Utica Water Works Co. v. City of Utica*, 31 Hun, 426. Where a contractor is entitled to be awarded a contract and he has

a remedy at law, *mandamus* will not lie. *People v. Thompson*, 99 N. Y. 641. A *mandamus* ought not to issue to compel the commissioner of public works to give a permit to erect columns in a street unless the relator has the absolute right so to do. *People v. Thompson*, 98 N. Y. 6. By chapter 496, Laws of 1886, *mandamus* is authorized upon refusal of board of excise to grant license in cities of over one hundred and fifty thousand inhabitants. The writ cannot be granted by the City Court. *People v. Board of Excise*, 3 State Rep. 253. For decision under the act, see *People v. Becker*, 3 State Rep. 203, where alternative *mandamus* was granted.

Town and village officers.—The writ will run to president of a village to compel him to sign bonds authorized to be issued. *People v. White*, 54 Barb. 622. To a board of town auditors to assemble and audit relator's claim. *People v. Auditors of Welford*, 53 Barb. 555; S. C. affirmed, 38 How. Ct. of App. 23; *People v. Board of Audit*, 4 Hun, 94. If town auditors arbitrarily cut down *per diem* services allowed by law, it is no audit and *mandamus* will lie. *People v. Town Auditors*, 82 N. Y. 80. To the county treasurer to issue his warrant for the collection of a tax, and the collector to pay over moneys. *People v. Brown*, 55 N. Y. 180; *People v. Halsey*, 37 id. 344. To compel commissioners to pay money to bondholders. *People v. Mead*, 24 N. Y. 114. To enforce contract made by town auditors. *Richmond Gas-light Co. v. Town of Middletown*, 59 N. Y. 228. To compel commissioner of highway to work a road. *People v. Collins*, 19 Wend. 56. To open a road after decision on appeal. *People v. Champion*, 16 Johns. 61; *People v. Barber*, 12 Barb. 193; *People v. Commissioners*, 1 Cow. 23; *Ex parte Sanders*, id. 544. But see *People v. Commissioners*, 8 N. Y. 476. But not where it would compel them to trespass. *People v. Commissioners*, 27 Barb. 94; *Ex parte Clapper*, 3 Hill, 458. To compel them to complete record of the decision. *People v. Jefferds*, 2 Hun, 149. The writ may direct change of highways and taking lands for that purpose. *People v. R. R. Co.*, 58 N. Y. 152. A *mandamus* will not issue to compel commissioners of highways to ascertain, describe and record what is claimed to be an old road; it is for the commissioners to decide the fact, and it is beyond the competency of the court to dictate their decision; it *seems* their decision may be reviewed. *People v. Hulse*, 38 Hun, 388. The writ will lie to inspectors of election to compel them to register a voter. *Matter of Collins*, 64 How. 63; *People v. Payne*, 12 Abb. N. C. 103. The writ will lie to compel assessors to conform to

order of County Court. *People v. Supervisors*, 65 N. Y. 300. To ascertain whether consents for town bonding have been obtained, and if so, make necessary oath. *Howland v. Eldredge*, 43 N. Y. 457. To reduce an assessment when illegal. *People v. Olmstead*, 45 Barb. 644. But not where affidavits to procure reduction are not in form required by law. *People v. Supervisors*, 15 Barb. 607. *Mandamus* will lie to compel assessors to strike non-residents illegally assessed from the rolls. *People v. Assessors*, 44 Barb. 148. But not to compel assessors to make oath as required by statute where they have not assessed property at full value. *People v. Fowler*, 55 N. Y. 252. Court will not compel discretion of a board of education. *People v. Easton*, 13 Abb. (N. S.) 159. Nor to appoint a teacher nominated by trustees. *People v. Board of Education*, 2 Abb. (N. S.) 177. Nor to compel board to pay salary, nor to reinstate a teacher. *People v. Inspectors*, 44 How. 322; *People v. School Officers*, 18 Abb. 165. It will compel board of education to pay claim justly due. *Dannat v. Mayor*, 66 N. Y. 585. It will run to loan commissioners to compel them to pay over moneys. *People v. Cotes*, 1 How. 160. But not to review act of commanding officer in discharging private on surgeon's certificate. *In re Dederick*, 77 N. Y. 595. Nor to restore relator to roll of militia where case is not clear. *People v. Clark*, 54 How. 483. It will not lie to compel an overseer of the poor to prosecute actions for penalties. *People v. Leonard*, 74 N. Y. 443.

To corporations.—The writ will lie to corporations to compel them to act in the line of their duty, and in cases where they have no discretion, as to the particular manner in which they shall act. *People v. Judges Dutchess Common Pleas*, 20 Wend. 658; *People v. Steels*, 1 Edm. 505. Where they have a discretion, the writ will simply put them in motion in the line of their duty. *People v. Collins*, 19 Wend. 56; *Fish v. Weatherwax*, 2 Johns. Cas. 215; *People v. Brennan*, 1 Abb. (N. S.) 184. A corporation will be compelled to hold an election. *People v. Albany Hospital*, 11 Abb. (N. S.) 4; *People v. Cummings*, 72 N. Y. 433. *Mandamus* is remedy to restore person to membership in benevolent corporation. *Doyle v. Benevolent Society*, 3 Hun, 361. To admit a member to a medical society. *People v. Medical Society of Erie*, 32 N. Y. 187. To compel a church to admit a member to the pulpit. *People v. Steele*, 1 Edm. 505. It will be granted to restore one to membership in a corporation from which he has been improperly expelled. *People v. Benevolent Society*, 3 Hun, 361; *People v.*

American Institute, 44 How. 468; *People v. Benevolent Society*, 24 id. 216; *People v. Commercial Association*, 18 Abb. 271. But he must show a clear legal right. *People v. Underwriters*, 7 Hun, 248. To compel railroad company to erect fences. *People v. Rochester, etc., R. R.*, 14 Hun, 371; affirmed, 76 N. Y. 294; *People v. Albany & Boston R. R.*, 7 id. 569. But not to compel a company to operate two lines of road where one would accommodate the public. *People v. Rome, etc., R. R. Co.*, 103 N. Y. 95. To compel corporation to supply gas. *People v. Manhattan Gas Co.*, 1 Abb. (N. S.) 404.

It will not lie.—To compel cemetery association to allow burial. *People v. Trustees of Cathedral*, 21 Hun, 184; reversing *Copper's Case*, 7 Abb. N. C. 121. To compel officer to carry out will of corporation. *People v. Brennan*, 39 Barb. 522. It was held in *Ex parte Fireman Ins. Co.*, 6 Hill, 243, that *mandamus* would not issue to compel transfer of stock. *Shipley v. Mechanics' Bank*, 10 Johns. 484; *People v. Parker Vein Coal Co.*, 10 How. 544. But see *People v. Mead*, 24 N. Y. 120. Or to transfer certificate of membership in exchange. *People v. Miller*, 39 Hun, 557. In *People v. Commissioners of Excise*, 7 Abb. 34, it was held the writ would not lie to compel excise board to issue license. But see chap. 496, Laws 1886, and *People v. Becker*, 3 State Rep. 202. It was held in *People v. Babcock*, 16 Hun, 313, that the writ would not be granted to compel an express company to carry goods. But see *People v. N. Y. C. R. R.*, 28 Hun, 543, where it was held that, in an action brought by attorney-general in name of the people, *mandamus* will lie to compel railroad corporation to exercise its duty as a carrier of freight and passengers. Persons who have been inmates of a charitable institution, but have no other rights, cannot be reinstated as inmates by *mandamus*. *People v. Trustees of Sailors' Snug Harbor*, N. Y. Daily Register, May 7, 1883. The writ will not issue to compel a corporation to remove a telegraph pole erected by a corporation, the remedy is an action for damages. *People, ex rel. McManus, v. Thompson*, 32 Hun, 93. The writ will not run against a foreign corporation to compel it to exhibit its books to a stockholder. *People v. N. P. R. R. Co.*, 50 N. Y. Super. 456. It has been held it will not lie to compel a religious corporation to restore a relator to membership. *People v. German Church*, 53 N. Y. 103.

Inspection and delivery of books.—It is held in *People v. Stevens*, 5 Hill, 616, that the writ will not lie to compel delivery of books.

In *People v. Hines*, 10 Week. Dig. 88, this is held with the quali-

fication, unless successor is concededly entitled to office. The writ will be granted to compel inspection of books of the corporation by officer or stockholder. *People v. Throop*, 12 Wend. 183; *People v. Pacific Mail*, 3 Abb. (N. S.) 364; *People v. Mott*, 1 How. 247; *Sage v. Lake Shore R. R.*, 16 Alb. L. J. 102, Ct. of App.; *People v. Lake Shore, etc.*, 11 Hun, 1; 70 N. Y. 220. See 50 N. Y. Super. 456. *supra*. Issued to compel officer of corporation who had lien on books to allow an inspection. *People v. German Hospital*, 8 Abb. N. C. 332. To compel corporation to correct certificate of death. *People v. Scheel*, 8 Abb. N. C. 342.

Right to office.—The writ was awarded to restore person to office. See *People v. Board of Police*, 35 Barb. 527, which was reversed, 26 N. Y. 316. The question is discussed in *People v. Board of Police*, 9 Abb. 257, and *People v. Stevens*, 5 Hill, 618. In the last case the writ was refused where another was in possession of the office claiming a right, although the contrary was held in *People v. Steele*, 2 Barb. 397, while in *People v. Board of Police, supra*, it was held the writ should not issue to restore one against whom cause of removal exists. Title to an office will not be tried on *mandamus*. *People v. Lane*, 55 N. Y. 217; *Matter of Gardner*, 6S id. 467. Nor will an officer be restrained from action by *mandamus*. *People v. Ferris*, 76 N. Y. 326. See as to the issuing of the writ to restore officer, *People v. Scrugham*, 20 Barb. 302; *People v. Mayor*, 3 Johns. Cas. 79; *People v. Dykeman*, 7 How. 124; *People v. Stephens*, 5 Hill, 616, note; see, also, 5 Wait's Prac. 569. The writ will issue to compel selection of inspectors of election by police board. *People v. Wheeler*, 18 Hun, 540. It will issue to compel an election to fill vacancy in office of alderman, and fix date of election. *People v. Common Council*, 77 N. Y. 503. (Distinguished, 97 N. Y. 274.) But there is no power to go behind election returns as in *quo warranto*. *People v. Supervisors*, 58 How. 141. The writ will not lie to compel corporation to elect a new officer in place of one not qualified. *Matter of Emet*, 7 Hun, 333.

To inferior courts and tribunals.—The writ may be granted to compel entry of judgment where inferior court cannot grant new trial. *Horne v. Barney*, 19 Johns. 247; *Haight v. Turner*, 2id. 370; *People v. Justices of Chenango*, 1 Johns. Cas. 180. And to compel settlement of case by referee. *People v. Justices*, 20 Wend. 663; *People v. Baker*, 14 Abb. 19; *Sikes v. Ransom*, 6 Johns. 279; *Delavan v. Boardman*, 5 Wend. 132; *People v. Judges of Westchester*, 2

Johns. Cas. 117. But not in a particular way. *People v. Baker*, 14 Abb. 19. Justice of Marine Court to perform duty not official. *People v. Shea*, 7 Hun, 303. An alternative *mandamus* is proper to raise the question as to proper entry of order on decision of judge. *People v. Supervisors*, 9 Abb. 408. To compel police commissioners to allow a policeman on trial to have counsel. *Matter of Ryan*, 1 Law Bull. 81. To compel county judge to file decision when made. *People v. Dodge*, 5 How. 47. And to place on calendar an appeal prematurely dismissed. *People v. County Judge*, 13 How. 277; *People v. County Judge*, id. 398; *People v. Cortelyou*, 36 Barb. 164. To compel issue of warrant in summary proceedings on proper proof. *People v. Willis*, 5 Abb. 205. To compel a subordinate court to give judgment, so writ of error can be brought. *People v. Stone*, 9 Wend. 182; *Ex parte Bostwick*, 1 Cow. 143. To compel a court to exercise statutory jurisdiction. *Matter of Hook*, 55 Barb. 257. To compel an inferior court to issue execution. *Cook v. Kirkland*, 2 How. 109; *People v. Gale*, 22 Barb. 502. The writ has been issued to inferior courts to compel them to set aside their orders. *People v. Judges*, 1 How. 109; *People v. Judges*, id. 111; *Matter of Application for Mandamus*, id. 200; *People v. Common Pleas*, 18 Wend. 234. The writ will not issue to compel a judge to change his decision on settling a case. *Tweed v. Davis*, 1 Hun, 252. Nor to correct error in dismissing appeal. *Ex parte Ostrander*, 1 Denio, 679. Nor any decision involving discretion. *People v. Judges*, 3 Cow. 39; *People v. N. Y. Sup. Ct.*, 19 Wend. 701; *People v. Marine Court*, 36 Barb. 341; *People v. Judges*, 18 Wend. 79; *People v. Tracy*, 1 How. 186; *People v. Baker*, 35 Barb. 105; *People v. Callahan*, 7 Daly, 434. As in case of opening surrogate's decree. *People v. Lott*, 42 Hun, 408. Nor to control the practice in inferior courts. *Ex parte Brown*, 5 Cow. 31; *People v. Common Pleas*, 2 How. 189; *Ex parte Chamberlain*, 4 Cow. 49. Nor to compel a court to allow an action to be removed to the United States court. *People v. Judges*, 2 Denio, 197. Nor to compel obedience to the order of another court. *Matter of Pond*, 11 How. 563. Nor to compel a court to vacate a rule in arrest of judgment. *Ex parte Bostwick*, 1 Cow. 143. Nor to compel a court to reverse a manifestly erroneous decision as it is judicial and involves discretion. *People v. Judges*, 21 Wend. 20; *Ex parte Koon*, 1 Denio, 644; *Elkins v. Athearn*, 2 id. 291; *Ex parte Jacobs*, 1 id. 646; *Ex parte Bailly*, 2 Cow. 479; *People v. Common Pleas*, 19 Wend. 113; *Ex parte Barrett*, 2 Cow. 458; *Ex*

parte Bacon, 6 id. 392; *Ex parte Coster*, 7 id. 523; *People v. Judges*, 20 Wend. 658; *Gilbert v. Judges*, 3 Cow. 59. Writ refused to compel superintendent of insurance department to pay over moneys. *Matter of N. A. Insurance Co.*, 80 N. Y. 152. Nor to a justice of a court where his time is occupied to compel him to entertain a particular case. *People v. McAdam*, 3 Civ. Pro. 396. In some of the above cases and others, the decision is also placed on the broad ground that the party has another adequate remedy.

§ 2067. A writ of *mandamus* is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor; and either with or without previous notice of the application, as the court thinks proper.

Parties.—The attorney-general may bring the writ on behalf of the State where a corporation neglects its public duties. *People v. N. Y. C. & H. R. R. Co.*, 3 Civ. Pro. 11. In matters of private or corporate right, the title of the relator to the right must appear; in matters of public right any citizen may be relator. *People v. Collins*, 19 Wend. 56. The writ may be applied for jointly by parties having a common interest, and the chief officers of a city or town may be joined as relators. *People v. Supervisors of Ontario*, 85 N. Y. 324; *People v. Supervisors of Ulster*, 17 Week. Dig. 138. Where a town was bonded for a railroad on condition that a depot should be maintained at a certain place, the agreement must be enforced by the town and cannot be enforced by a proceeding instituted by the attorney-general on behalf of the State. *People v. Rome, etc., R. R. Co.*, 103 N. Y. 95. In cases where the interest is common to the whole community, it is not necessary that the relator show an individual right, any person interested in the enforcement of a statutory right may be relator. *People v. Supervisors*, 17 Hun, 501; S. C., 85 N. Y. 324; *People v. Halsey*, 37 id. 344; *People v. Supervisors*, 56 id. 249; *People v. Asten*, 62 id. 623; *People v. Common Council*, 20 How. 401. See *People v. Common Council*, 20 Alb. L. J. 269, Ct. of App.; S. C., 78 N. Y. 33; *People v. Tracy*, 1 How. 186. It was held, however, in *People v. Hoyt*, 66 N. Y. 606, that a resident and tax payer could not compel assessors to perform their duty by *mandamus*.

The affidavit.—The affidavit upon which the writ is granted must not be entitled in a cause. *Haight v. Turner*, 2 Johns. 371; *People v. Common Pleas*, 1 Wend. 291; *People v. Sage*, 2 How. 59; *People v. Dikeman*, 7 id. 124. See *Ex parte La Farge*, 6 Cow. 61.

The cause may take its title on granting of the order for the writ. *People v. Sage*, 2 How. 60. The affidavits must show the facts. 1 Johns. Cas. 134; 3 T. R. 575. The facts should be set forth with precision. 5 T. R. 466; 2 Johns. Cas. 211.

Precedent for Affidavit.

ULSTER COUNTY, ss.:

Louis Bevier, of the town of Marbletown, in the county of Ulster, being duly sworn, says that he is the supervisor of said town, and acting as such.

That at the annual session of the board of supervisors of Ulster county in 1886, which has not yet closed, the said board so equalized the value of the real estate in said county, and especially of the town of Marbletown, as to do great injustice to said town; that an appeal has been taken by said town from such equalization to the State assessors; that on the 29th day of November, 1886, a resolution was adopted by said board, a copy of which is hereto annexed, in and by which the sum of \$10,000 was directed levied and raised on the entire county of Ulster for the payment of the expenses of the said appeal, in opposition, and contrary to and against the interests of the said town, and not for the benefit or in the interest of the entire county, but for the sole use and benefit of the towns in said county which may be benefited by the said equalization as appears in and by said resolution. Wherefore deponent prays that a *mandamus* issue out of this court directing and commanding the said board of supervisors of Ulster county to strike said sum of \$10,000 from the assessment-roll, so far as it relates to and affects the town of Marbletown, and that they shall not levy any part of the same on the said town of Marbletown, and to modify said resolution so as that no part of said sum shall be so levied, or for such other or further order as to the court shall seem just.

LOUIS BEVIER.

Subscribed and sworn to before }
me, December 2, 1886. }

HENRY E. MCKENZIE,

Notary Public.

Another Precedent.

ULSTER COUNTY, ss.:

Michael Dunn, being duly sworn, says he is the supervisor of the town of Kingston. That upon application of the attorney for persons holding claims against the old town of Kingston, before its division on indebtedness which accrued before the division of that town, this deponent called a meeting, pursuant to statute, of the officers authorized to apportion the debts of said old town between the towns of Kingston, Ulster and Woodstock, for the purpose of making such apportionment. That a copy of said call, with proof of service thereof on the supervisors and overseers of the poor of the towns of Ulster and Woodstock, is hereto annexed. That said notice was served on Michael Britt, overseer of the poor of the town of Kingston, by deponent on the 25th day of November, 1885. That at the time and place mentioned in said notice, to-wit, at the house of Bernard Johnson in

the town of Ulster, on the 30th day of November, 1885, at ten o'clock in the forenoon, this deponent, supervisor of said town of Kingston, and Michael Britt, overseer of the poor of said town of Kingston, appeared and attended for the purpose of taking proper action pursuant to said call. That the supervisor of the town of Ulster, Lorenzo Dunnegan, and Martin E. Hendricks, the overseer of the poor of the said town, and Albert Vosburgh, supervisor of the town of Woodstock, and Andrew Eltinge, overseer of the poor of said town of Woodstock, failed and neglected to appear at the said place of meeting, although deponent and said Michael Britt waited at said place for more than an hour after the time named in said notice or call.

Deponent is informed by Bernard Johnson, at whose house said meeting was called, that said supervisors and overseers of the poor of said towns of Ulster and Woodstock did not attend at all during that day, nor at any time pursuant to said call or notice.

That deponent is informed by said Lorenzo Dunnegan that they do not intend to appear or act in the matter. That said town of Kingston was divided in the year 1879, a part thereof remaining as the town of Kingston, and a part of the balance thereof erected into the town of Ulster, and a part annexed to the town of Woodstock.

That the abstract hereto annexed is an abstract of the claims audited against the said old town of Kingston before its division and remaining unpaid, and shows debts owing by said old town, as deponent believes, to the amount of \$20,000 and upwards.

(*Jurat.*)

MICHAEL DUNN.

Precedent for Alternative Mandamus in First Instance.

The People of the State of New York, ex rel. Charles Bray, Mayor of the City of Kingston, and Louis Bevier, Supervisor of Marbletown, to the Board of Supervisors of the County of Ulster :

WHEREAS, It appears to us by the relation and complaint of Charles Bray, on behalf of the city of Kingston, and Louis Bevier, on behalf of the town of Marbletown, that the said city of Kingston and the said town of Marbletown have taken separate appeals from the action of the board of supervisors of the county of Ulster for the year 1886, equalizing the valuation of said city and town, and that said board of supervisors have passed a resolution levying and assessing upon the whole of said county of Ulster, including said town of Marbletown and city of Kingston, the sum of \$10,000 for the purpose of defraying expenses of said appeal and sustaining their said decision, and that no part of said sum ought to be levied and assessed on the said relators:

Now, therefore, we command you, that immediately upon the receipt of this writ, you strike the said sum of \$10,000 from the amount to be raised on the said county of Ulster, so far as the said city of Kingston and town of Marbletown are affected thereby, and so amend, modify or reconsider your said action in so levying and assessing the same on the whole county, as that no part of said \$10,000 shall be levied and assessed on said town of Marbletown or the city of Kingston, or that you show cause why the command of this writ should not be obeyed, and that you make return to this writ pursuant to the provisions of section 2072 of the Code of Civil Procedure, at the office

of the clerk of the Supreme Court in and for the county of Ulster, at his office in the city of Kingston, twenty days after the service thereof upon you.

Witness, Hon. Samuel Edwards, justice of the said court, at the [L. s.] court-house in Hudson, on the 20th day of December, 1886.

J. D. WURTS, *Clerk.*

By M. S. DECKER, *Deputy.*

ndorsed: — “ Allowed this 20th day of December, 1886.”

SAMUEL EDWARDS,

Justice Supreme Court.

The writ under the Code of Civil Procedure is a legal writ, and the forms of procedure and rules which governed in the Court of Chancery are applicable. *People v. French*, 3 Civ. Pro. 180.

§ 2068. Except where special provision therefor is otherwise made in this article, a writ of *mandamus* can be granted only at a Special Term of the court. In the Supreme Court, the Special Term must be one held within the judicial district, embracing the county, wherein an issue of fact, joined upon an alternative writ of *mandamus*, is triable, as prescribed in this article.

The provisions of this section as to application to a Special Term in the district embracing the county where the venue would be laid on an issue of fact on an alternative *mandamus* is a new one and establishes a different rule from that authorizing motions to be made in a county adjoining the district of the venue. It evidently overrules *People, ex rel., v. Supervisors*, 2 Abb. (N. S.) 78, and *Mason v. Miller*, 7 Hun, 23, so far as they authorize the application out of the district. The superior courts have power to grant *mandamus*. *People, ex rel., v. Green*, 58 N. Y. 295.

§ 2069. A writ of *mandamus* may be granted, at a General Term of the Supreme Court only, directed generally to any judge holding, or to hold, a Special Term of the same court, or directed to one or more judges of the same court, named therein, in any case where such a writ may be issued out of the Supreme Court, directed to any other court, or to a judge thereof. Such a writ can be granted only at the General Term of the judicial department, embracing the county wherein the action is triable, or the special proceeding is brought, in the course of which the matter sought to be enforced by the *mandamus* originated, unless that General Term is not in session; in which case, it may be granted at the General Term of an adjoining judicial department.

The evident intent of this section is to authorize the General Term to issue the writ where the action of a Special Term is to be affected, to prevent the anomaly of one Special Term granting the writ against another Special Term, or against one or more judges of the same or another court. It is probable that the “ may ” of this section in accordance with well-settled principles would be construed as “ must ” in case the aid of one Special Term was invoked against another and

the matter sent to the General Term for action, not, however, as in any way binding the discretion of the General Term as to the granting of the writ.

§ 2070. A peremptory writ of *mandamus* may be issued, in the first instance, where the applicant's right to the *mandamus* depends only upon the questions of law, and notice of the application has been given to a judge of the court, or to the corporation, board, or other body, officer, or other person, to which or to whom it is directed. The notice must be served, at least eight days before the application is heard; unless a shorter time is prescribed by an order to show cause, made where the application is to the Special Term, by the court or a judge thereof; or, where the application is to the General Term, by the General Term, or a General Term justice, of that judicial department. In such a case, the application must be founded upon affidavits, or other written proofs, a copy of which must be served with the notice, or order to show cause. Where the court, board, or other body to be served, consists of three or more members, the notice or order to show cause, and the papers upon which the application is to be made, may be served, as prescribed in the next section for service of an alternative writ of *mandamus*. Except as prescribed in this section, or by special provision of law, a peremptory *mandamus* cannot be issued, until an alternative *mandamus* has been issued and duly served, and the return day thereof has elapsed.

The question as to when either a notice of motion should be given, or order obtained to show cause why peremptory writ should not issue on the one hand, or an alternative writ be applied for and served at the outset, on the other, is a perplexing matter with practitioners who must gather their information on the subject entirely from the books. However, the practice laid down in *Commercial Bank v. Canal Commissioners*, 10 Wend. 25; *People, ex rel., v. Judges of Rensselaer*, 3 How. 164; and *People v. Board of Supervisors of Dutchess*, id. 379, gives very substantial aid on that point, and from those decisions and the current practice of the courts, familiar to those who have been accustomed to have recourse to this remedy, but somewhat perplexing to the young practitioner, it may be said, the alternative writ is not usually asked for in the first instance unless it is apparent that a question of fact requiring the intervention of the trial court will be necessary. In case of no immediate necessity for early action the usual eight-day notice of motion is given for any Special Term in the district. In case time is essential an order to show cause is obtained upon showing in the affidavit, which is the foundation of the writ, that it is necessary that the motion should be heard at an earlier date. The matter then comes up on the affidavits made and of course served with the order to show cause, and in case no issue of fact is made it becomes a question of law whether, upon the plaintiff's own showing, he is entitled to the writ, and in case he is so entitled, a peremptory writ issues directing the

act to be performed, and on the order made, the writ issues. The only alternative to the defendant then is to perform the act and so return to the court. In that case very frequently no return is ever made, as the result sought to be attained is accomplished and the proceeding is abandoned, the relator having no further interest in pressing the matter. On the other hand, in case the defendant wishes to appeal he applies for a stay of proceedings under section 2089, and no return is necessary, as the matter goes up for argument on the papers before the Special Term. A return is proper where the writ is obeyed, setting out that fact, as also a return may be filed showing the pendency of an appeal and stay thereon. So in case the writ is denied, the relator may appeal and the matter comes up before the General Term as to whether or not the Special Term should issue the writ. But in case the facts are disputed by defendant upon the coming on of the motion a resort must be had to the alternative writ, and as will be seen hereafter, that writ takes the form of a pleading to which an answer is interposed and the issue tried. It will be noticed in the older cases that doubt is thrown upon the right to appeal from an order denying the writ, and that it is suggested that the alternative writ be resorted to in such case; this is not now followed in practice, the appeal being taken, as before stated, from the order denying the motion for the writ; this question, however, is more appropriately treated under section 2078.

The practical reason for resorting to the alternative writ only when it is found necessary by reason of questions of fact being raised, is doubtless the greater ease and simplicity of the proceeding by motion for the peremptory writ, which only involves motion papers, and not the more complicated machinery of the alternative writ, which, when thus used, has only the effect of an order to show cause, unless in a special case some ulterior object is sought. A peremptory writ will usually be granted on the return of the order to show cause, if the relator's affidavits are not met or avoided where he has the legal right to relief. *People v. Assessors*, 52 How. 140; *Achley's Case*, 4 Abb. 35; *Ex parte Rogers*, 7 Cow. 526; *People, ex rel., v. Throop*, 12 Wend. 183; *People, ex rel., v. Supervisors*, 11 Abb. 114; affirmed, 3 Abb. Ct. App. Dec. 566; *People v. Supervisors*, 2 Keyes, 288; *People, ex rel., v. Supervisors*, 64 N. Y. 600. See *People, ex rel., v. Contracting Board*, 27 id. 378; *People v. Commissioners of Highway*, 6 Wend. 559; *People v. Commissioners of Highway*, 7 id. 475; *People v. Cayuga Common Pleas*, 10 id. 632; *People v. Beebe*, 1 Barb. 379; *People v. Brennan*, 39

id. 522. When opposing affidavits are read on application for the writ, conflicting with the moving affidavits, and the relator demands a peremptory writ, it is equivalent to a demurrer on his part, and the right to the writ must be determined on the assumption that the opposing affidavits are true. *People, ex rel., v. Becker*, 3 State Rep. 202; *People v. Cromwell*, 102 N. Y. 477; reversing 38 Hun, 384. On the other hand, where the defendant proceeds to a hearing without traversing the averments of the moving affidavits, this is equivalent to a demurrer on his part, and the truth of plaintiff's averments is to be considered as admitted. *People, ex rel., v. Supervisors of St. Lawrence*, 103 N. Y. 541. Where, according to well-settled rules of law, the relator is entitled on all the papers to all the relief asked for, the writ must issue in the first instance. It is sufficient that no defense appears on the papers. *People, ex rel., v. Supervisors of Otsego*, 51 N. Y. 401. It has been held that on application for alternative writ, if the defendant does not show cause sufficient to prevent the issue of a peremptory writ, that writ may issue. *People v. Throop*, 12 Wend. 183; *Ex parte Jennings*, 6 Cow. 518. But a relator is not entitled to a peremptory writ if a material issue of fact is raised by affidavits. When the right to a writ depends on disputed questions of fact an alternative writ is proper. *People v. Becker*, 3 State Rep. 202. The peremptory writ will be awarded where the return to the alternative writ is insufficient or evasive. *Matter of Trustees of Williamshburgh*, 1 Barb. 34; *People v. Seymour*, 6 Cow. 579; *People v. Collins*, 7 Johns. 549. Where argument has been had on application for a peremptory writ and decision made denying it, no request having been made to issue the alternative writ before the determination, a motion by relator to modify the order, so as to permit an alternative writ, is directed to the discretion of the court, and its decision is not reviewable by the Court of Appeals. *People, ex rel., v. Wendell*, 71 N. Y. 171; *People, ex rel., v. Fairman*, 91 id. 385; *People v. Board of Apportionment*, 64 id. 627. The peremptory writ will not issue except in case of clear unquestioned legal right. It should not be granted on a disputed claim or where its validity is controverted. In such case an alternative writ is proper. *People, ex rel., v. Supervisors*, 64 N. Y. 600; *People, ex rel., v. Wendell*, 71 id. 171. And this has been held in one case to be the rule in a case where the affidavits in opposition are evasive. *People v. Supervisors*, 5 Week. Dig. 538. On appeal from an order directing an attachment for a contempt in disobeying a *mandamus*, the court may direct a new peremptory

writ to issue in such form as to meet the exigencies of the case. *People, ex rel., v. Supervisors of Delaware*, 9 Abb. (N. S.) 408; affirmed, 45 N. Y. 196. On an application for the peremptory writ, the court will take the facts, so far as they are disputed, as they appear by defendant's affidavits. *People, ex rel., v. Richards*, 99 N. Y. 620. In *People, ex rel., v. Rome, etc., R. R. Co.*, 103 N. Y. 95; 3 State Rep. 39, it is held by the court, Earl, J., writing the opinion, that in determining whether a peremptory writ is properly issued, the court can consider only such facts alleged in the petition as are not denied or put in issue, and the affirmative allegations on the part of the defendant in opposition to the writ. Where the material allegations of the application for the writ are put in issue, or where the answering affidavits contain allegations showing that a peremptory writ ought not to be issued, the court should award an alternative *mandamus* in the first instance in order that the issue of fact may be regularly tried before the proper tribunal. The order granting the writ may be entitled. *People v. Sage*, 2 How. 60.

Precedent for Order to show Cause why Peremptory Writ should not Issue.

At a Special Term of the Supreme Court, held at the court-house in the city of Albany, December 1, 1884:

Present — Hon. Charles R. Ingalls, *Justice*.

The People of the State of New York <div style="text-align: center;"><i>agst.</i></div> The Board of Supervisors of the County of Ulster.	}
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Upon the annexed petition of I. H. Maynard, deputy attorney-general of the State of New York, let the above-named, the board of supervisors of the county of Ulster, or its attorneys, show cause at a Special Term of the Supreme Court to be held in and for the county of Ulster, at the court-house in Kingston, N. Y., on the 3d day of December, 1884, at one o'clock in the afternoon of said day, why a peremptory writ of *mandamus* should not issue out of and under the seal of this court, directed to the above-named board of supervisors of the county of Ulster, requiring the said board of supervisors thereafter to forthwith raise by taxation upon the taxable property situated in the said county of Ulster, State of New York, in the same manner as other State taxes are raised, an amount sufficient to pay the indebtedness of said county mentioned in the said affidavits annexed, to the State of New York, and why such other and further relief should not be accorded in the premises as may be just, and let service of this order of less than eight days, to-wit, on or before the 2d day of De-

ember, 1884, be deemed sufficient, cause therefor appearing in said petition annexed.

Dated ALBANY, December 1, 1884.

C. R. INGALLS,
Justice Supreme Court.

Order for Peremptory Writ.

At a Special Term of the Supreme Court of the State of New York, held at the chambers of Mr. Justice Peckham, in the city of Albany, on the 8th day of January, A. D. 1885:

Present — The Honorable Rufus W. Peckham, *Justice.*

The People of the State of New York

agst.

The Board of Supervisors of the County
of Ulster.

The order to show cause herein granted at Albany Special Term, on the 1st day of December, 1884, and made returnable on the 2d day of December, 1884, at Kingston Special Term, having been continued from said return day until the present term of this court, and coming on to be heard; after reading and filing the petition of Isaac H. Maynard, deputy attorney-general, verified December 1, 1884, and said order to show cause, and the affidavit of F. B. Delehanty, sworn to December 1, 1884, and after hearing the Hon. Isaac H. Maynard, of counsel for the plaintiffs, for, and J. N. Fiero, Esq., of counsel for said defendant, in opposition thereto, it is

Ordered, that the prayer of said petition be and the same is hereby granted, and that a peremptory writ of *mandamus* issue out of and under the seal of this court, directed to the above-named board of supervisors of Ulster county, and requiring said board thereafter to forthwith raise by taxation upon the taxable property situated in said county of Ulster, in the same manner as other State taxes are raised, the sum of twenty-eight thousand and ninety-eight dollars and twenty-two cents (\$28,098.22), with interest thereon from December 1, 1884, said sum being the amount of the indebtedness of said county to the State of New York, and pay the same into the treasury of the State.

Said plaintiffs are hereby allowed the sum of fifty dollars (\$50) as their costs of this proceeding.

Enter in Albany county.

R. W. PECKHAM,
Justice Supreme Court.

The recitals and statements in writ must be sufficient to show what is required without reference to the affidavits. *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25. But it should contain nothing but pertinent allegations. *People v. Ovenshire*, 41 How. 164. The alternative writ is in the nature of a pleading. *People v. Ransom*, 2 N. Y. 490.

Precedent for Peremptory Writ.

The People of the State of New York to the Board of Supervisors of Ulster County :

WHEREAS, It appears to us from the petition of Isaac H. Maynard, deputy attorney-general, verified December 1, 1884, that the said county of Ulster is indebted to the State of New York for unpaid certificates assigned by the comptroller to said county in pursuance of the provisions of the several acts of the legislature in said petition referred to, in the sum of twenty-eight thousand ninety-eight and 22-100 dollars (\$28,098.22), with interest from December 1, 1884, and that, nevertheless, you have unjustly refused to raise by taxation, or cause to be raised, as required by law, the amount due the State by reason of the facts in said petition stated, as appears therefrom, and which petition we have adjudged to be true as appears to us of record:

Now, therefore, we command you forthwith to raise or cause to be raised by taxation upon the taxable property situated in said county of Ulster, in the same manner as other State taxes are raised, the said sum of twenty-eight thousand and ninety-eight and 22-100 dollars (\$28,908.22) with interest thereon from December 1, 1884, and pay the same into the treasury of the State of New York.

And in what manner this, our command, is executed, make appear to our said Supreme Court at its Special Term, to be held in the city of Albany on the 9th day of February next, then and there returning this our writ according to the provisions of title 2, chapter 16, of the Code of Civil Procedure.

Witness, the Hon. Rufus W. Peckham, justice of our said court, at [L. s.] the City Hall in Albany, this 9th day of January, A. D. 1885.

WM. D. STREVELL,

D. O'BRIEN,
Attorney-General.

Clerk.

Another Precedent for Writ.

To the People of the State of New York, on the relation of Patrick Casey, William Ryan and James Parslow, to Lorenzo Dunnegan, Supervisor, and Martin E. Hendricks, Overseer of the Poor of the Town of Ulster, Albert Vosburgh, Supervisor, and Andrew Elting, Overseer of the Poor of the Town of Woodstock, and Michael Dunn, Supervisor, and Michael Britt, Overseer of the Poor of the Town of Kingston :

WHEREAS, It appears on the relation of Patrick Casey, William Ryan and James Parslow, that they are the owners and holders of certain claims against the old town of Kingston, as it existed previous to the division of the town in 1879, which said claims were audited by the board of town auditors of said town, and are valid and subsisting claims against said town, and that the towns of Ulster and Kingston have been formed from said town of Kingston, and a portion thereof annexed to the town of Woodstock, and that the supervisors of said towns and overseers of the poor thereof have never met or apportioned the debts owing by said town of Kingston as it existed before the division. That a call was made by the supervisor of the town of Kingston for a meeting for that purpose, and that the super-

visors and overseers of the poor of the towns of Ulster and Woodstock failed to appear at the time and place mentioned, due notice thereof having been given them:

Now, therefore, we command you that you and each of you meet at the house of Bernard Johnson, in the town of Ulster, on the 10th day of December, 1885, at ten o'clock in the forenoon of that day, and then and there proceed to apportion the debts owing by the town of Kingston, as it existed before the division thereof, between the towns of Ulster, Kingston and so much of Woodstock as is liable therefor by reason of having been set off from said old town of Kingston and annexed to said town of Woodstock, and that you complete such apportionment and make and file a certificate thereof, and furnish a copy of the same to relator's attorneys on their request before the 12th day of December, 1885, and in what manner this, our command, is executed, make appear to our Supreme Court at the City Hall in the city of Kingston, on the 12th day of December, 1882, then and there returning this our writ, according to the provisions of title 2 of chapter 16, Code of Civil Procedure.

Witness, Hon. A. M. Osborn, justice of the Supreme Court at his [L. S.] chambers in the village of Catskill, on the 7th day of December, 1885.

JACOB D. WURTS,
Clerk.

F. L. & T. B. WESTBROOK,
Attorneys for Relators.

Indorsed: — "Allowed this 7th day of December, 1885."

A. M. OSBORN,
Justice Supreme Court.

A seal is necessary to a writ of *mandamus*, and where a writ was served which had no seal, it was not sufficient to found proceedings for contempt when it was not obeyed. *People, ex rel. Clapp, v. Fisk*, 1 Hun, 464; S. C., 3 T. & C. 461. It should be tested, signed and sealed. 1 Burr. Pr. 95, 97; 2 id. 177. The writ must set forth with certainty the duty to be performed. *People, ex rel. Clark, v. Commissioners of Reading*, 1 T. & C. 193; *Fisk v. Weatherwax*, 2 Johns. Cas. 215. But it must not ask too much or it will be denied, particularly if an alternative writ has been issued setting out the act required. *People v. Supervisors*, 1 Hill, 50; *People v. Supervisors*, 12 Barb. 446; *People v. Brennan*, 39 id. 523; *People v. Baker*, 35 id. 105; *People, ex rel. Byrnes, v. Green*, 64 id. 162; *People, ex rel., v. Cady*, 2 Hun, 224. The writ may be amended as to irregularities at any time before it is returnable. *People v. Baker*, 35 Barb. 104; *People v. Metropolitan Police Commissioners*, 5 Abb. 241. It was held in the case first cited that the writ could not be amended after return, but the case last above cited probably gives the rule as it is now held, that the provisions with regard to amendments to pleadings must be held to extend to the writ; more particularly is this the case since the al-

ternative writ is held to be a pleading. On the same point is *People v. Commissioners of Highways of Fort Edward*, 11 How. 89.

§ 2071. An alternative writ of *mandamus* must be served by showing the original writ, and delivering a copy thereof to the person to be served. Where it is directed to a court, or to the judge or judges of a court, it must be served, either in term time or in vacation, upon the judge or judges of the court; except that where the court consists of three or more judges, service upon a majority of them is sufficient. Where it is to be served upon a board or body, other than a corporation, service must be made upon a majority of the members thereof, unless the board or body was created by law, and has a chairman or other presiding officer, appointed pursuant to law; in which case, service upon him is sufficient. Where the writ is to be served upon a corporation, service thereof may be made upon any officer upon whom a summons, issued out of the Supreme Court, may be served. Where one or more of the persons, upon whom to make service, as prescribed in this section, cannot, after due diligence, be found, the exhibition of the original writ may be dispensed with, and service may be made upon him or them, as prescribed by law for the service of a summons issued out of the Supreme Court.

§ 2072. An alternative writ must be made returnable twenty days after the service thereof, at the office of the clerk of the court, or in the Supreme Court, the clerk of the county designated therein, in which an issue of fact joined thereupon is triable. A peremptory writ must be made returnable at a General or a Special Term designated therein, to which application for the alternative writ might have been made.

These sections seem to embody so much of the previous decisions as it seemed desirable to do, and to distinctly prescribe such rules as to render many others obsolete. They so clearly express the present practice as to make it superfluous to cite the older authorities, which would only serve to confuse, where they lay down the same or a different practice. It is only necessary to say that among the decisions no longer in point are those directing that the writ should be returnable at a Special Term.

§ 2073. Where the first writ of *mandamus* has been duly served, a return must be made to the same, as therein required, unless it is an alternative writ, and a demurrer thereto is taken. In default of a return, the person or persons, upon whom the writ was served, may be punished, upon the application of the people, or of the relator, for a contempt of court.

The person, body, board, tribunal or corporation to whom the writ is directed, and upon whom it is served, must make a return, unless the writ is quashed or the defendant performs the act directed, and thus disposes of the controversy. *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25. In case of an alternative writ of course it would be necessary for the defendant to appear and

show that the act had been performed. The question of costs, too, would come up at that time. In case of failure to make return, proceedings may be taken as for contempt, and founded upon the usual papers for that purpose.

Return of Compliance with Writ.

(Title.)

The return of the defendants to the peremptory writ of *mandamus* granted herein on the 7th day of December, 1885, shows to the court that on the 10th day of December, 1885, we met at the time and place commanded in the writ, and proceeded to act in accordance with the directions therein contained, and we certify and return that we apportioned the debts owing by the old town of Kingston at the time of its division, in 1879, as follows, upon the towns of Ulster, Kingston, and so much of Woodstock as was annexed thereto from said town of Kingston, as follows, viz. : That the town of Ulster be charged with .9096 of the whole indebtedness of said town of Kingston as it existed at the time of such division; that the town of Kingston be charged with .053 per cent of said indebtedness, and that the portion of the town of Woodstock annexed to said town from the old town of Kingston be charged with .0374 per cent thereof.

We further certify and return that from the abstracts presented to us we find the indebtedness of said old town of Kingston, at the time of the division, to have been the sum of \$22,573.38.

In witness whereof the members of said board of apportionment have hereunto affixed their signatures, this 10th day of December, 1885.

(Signed by members individually.)

M. SCHOONMAKER,
Attorney for Defendants.

Form of Judgment.

(Title.)

A peremptory writ of *mandamus* having issued out of this court after due notice to the defendants herein, on order of Special Term, granted December 5, 1885, in and by which these defendants were directed to meet at the house of Bernard Johnson, in the town of Ulster, on the 10th day of December, 1885, then and there to apportion the debts owing by the old town of Kingston, between the towns of Ulster, Kingston and a portion of Woodstock, and granting fifty dollars costs and their disbursements to relators, and the defendants having made and filed the certificate required by such order and writ and return thereto: Now, on motion of F. L. & T. B. Westbrook, attorneys for relators, it is adjudged that the town of Ulster be charged with .9096 per cent of the whole indebtedness of the said town of Kingston as it existed before the division; that the town of Kingston be charged with .0530 per cent of the whole indebtedness of said town of Kingston as it existed before the division. That the portion of the town of Woodstock annexed to said town from the old town of Kingston be charged with .0374 per cent of the whole indebtedness of said town of Kingston as it existed before the division.

It is further adjudged that the plaintiff's relators recover of the

defendants, Lorenzo Dunnegan, Martin E. Hendricks, Albert H. Vosburgh and Andrew Elting, the sum of seventy-two dollars and sixty-nine cents, cost and disbursements, and have execution therefor.

M. S. DECKER,
Deputy Clerk.

Precedent for Demurrer to Alternative Writ.

(*Title.*)

The defendant herein demurs to the alternative writ of *mandamus* heretofore served, on the grounds,

First — That there is an improper joinder of parties as relators.

Second — That the causes of action or matters set out as the grounds for the writ are improperly joined.

Third — That the facts set out in the affidavit of relator's are insufficient to entitle them to the relief asked, or to any relief by way of *mandamus*.

H. CHIPP, Jr.,

Attorney for Defendant.

Precedent for Return to Alternative Writ.

(*Title.*)

The defendant making return to the alternative writ of *mandamus*, heretofore served, shows to the court that the command of the writ has been fully complied with and obeyed, in that the sum of \$10,000 levied and assessed on the county of Ulster, for the purpose of paying on the part of Ulster county the expenses of the assessment taken by the town of Marbletown and the city of Kingston, has been stricken from the sum to be levied on the county at large, and no part of said sum is now levied or assessed against said town or city.

THE BOARD OF SUPERVISORS OF ULSTER COUNTY.

By HOWARD CHIPP, Jr., *its Attorney.*

(*Add verification by chairman.*)

§ 2074. The return to an alternative writ of *mandamus* must be annexed to a copy of the writ; and must be filed in the office of the clerk, where it is returnable, within the time specified in the writ. The return to a peremptory writ of *mandamus* must be likewise annexed to a copy thereof; and must, before the expiration of the first day of the term at which it is returnable, be either delivered in open court, or filed in the office of the clerk of the court, or, in the Supreme Court, the clerk of the county wherein the term is to be held.

It has been held to be no excuse for not making the return that the writ has not been returned and filed. *People v. Westchester Common Pleas*, 4 Cow. 73; *Root v. King*, id. 403. See *Snowden v. Roberts*, id. 69. The time to make the return may be extended by order, as in case of a pleading. *People v. Judges of Ulster County*, 1 Johns. 64; *People v. Westchester Common Pleas*, 4 Cow. 73; *Root v. King*, id. 403.

§ 2075. An alternative writ of *mandamus* cannot be quashed or set aside upon motion, for any matter involving the merits. A motion to set aside such a writ, for any other cause, or to set aside or quash a peremptory writ of *mandamus*, or

to set aside the service of either writ, must be made at a term, whereat the writ might have been granted.

A motion to quash or set aside the writ is founded upon some irregularity or defect in the writ or procedure anterior thereto. *People v. Collins*, 19 Wend. 67; *Commercial Bank of Albany v. Canal Commissioners*, 10 id. 25; *People v. Tracy*, 1 How. 186. The motion may be made after service of alternative writ and before the return. *People v. Board of Supervisors*, 14 Barb. 52. The motion gives the defendant the benefit of a demurrer without resorting to that plea, since it is in the nature of a demurrer, and admits the truth of the matters alleged. *People v. College of Physicians and Surgeons*, 7 How. 290; *People, ex rel., v. Supervisors*, 32 Barb. 473. Immaterial or argumentative matters or surplusage may be stricken out of a return. *People v. Commissioners of Highways of Fort Edward*, 11 How. 89; *People v. Van Leuven*, 8 id. 358; *People v. Ransom*, 2 N. Y. 496. An evasive return might, under the former practice, be quashed on motion. *People v. White*, 11 Abb. 168; *People v. Board of Police*, 8 id. 257. The practice as to motion to quash or set aside the writ is considered in *People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 543. In that case the relators obtained an order to show cause why a peremptory writ of *mandamus* should not issue; on the return day defendants appeared by counsel and moved to quash on the grounds that the moving papers did not show facts sufficient to entitle the relator to the relief asked; thereupon the defendant was allowed to be heard, and under objection to open and close the argument, and the motion was granted to quash. It was held to be irregular to hear such a motion before the issuing of the writ, and also to allow the defendant to open and close the argument, and that the proper practice is to move to quash or set aside after granting of an alternative writ, and before return, treating the motion substantially as a demurrer. The objection that the supervisors of several towns joined as petitioners for a *mandamus* to compel the board of supervisors to obey an order of the State assessors must be taken by motion to quash; it does not go to the merits; and when the board has answered and a demurrer to the answer been interposed the matter must be heard on the merits. *People, ex rel., v. Board of Supervisors*, 85 N. Y. 323. It is further held in the same case that the ground above stated is not sufficient ground to quash, and the same principle is held in *People, ex rel. Bray, v. Supervisors of Ulster County*, 17 Week. Dig. 138, where the mayor of a city and supervisor of a town united as petitioners.

Precedent for Notice of Motion to Quash.

SUPREME COURT.

People, <i>ex rel.</i> Charles Bray <i>et al.</i> , <i>agst.</i> Board of Supervisors of Ulster County.	}
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Please take notice that this court will be moved at a Special Term thereof, to be held at the City Hall in the city of Albany, on the 30th day of December, 1886, at the opening of the court on that day, for an order quashing and setting aside the alternative writ of *mandamus* herein granted December 20, 1886, or for such other or further relief as to the court may seem just. Yours, etc., H. CHIPP, Jr.,

To J. J. LINSON, Esq.,

*Attorney for Defendant.**Corporation Counsel, Attorney for Relators.*

§ 2076. The statement contained in an alternative writ of *mandamus* of the facts constituting the grievance, to redress which it is issued; the joinder therein of two or more such grievances; and the command of the writ, are subject to the provisions of chapter sixth of this act, respecting the statement in a complaint of the fact constituting a cause of action; the joinder therein of two or more causes of action; and the demand of judgment thereupon. The person upon whom the writ is served, instead of making a return thereto, may file in the office where the writ is returnable, a demurrer to the writ; or he may file a demurrer to a complete statement of facts contained in the writ, as constituting a separate grievance, and make a return to the remainder of the writ. A demurrer may be thus taken in a case where a defendant may demur to a complaint, or to a cause of action separately stated in a complaint, as prescribed in chapter sixth of this act; and it must be in like form.

The writ of alternative *mandamus* is, when granted in the first instance, in the nature of an order to show cause. *People v. Rensselaer Common Pleas*, 3 How. 164; *People v. Canal Com.*, 10 Wend. 25. But also stands as a pleading. *People v. Ovenshire*, 41 Hun, 164; *People v. Ransom*, 2 N. Y. 490. It is for this reason that the order to show cause is usually preferred in the first instance, since it is drawn more readily, and does not require the care of a pleading. In *People v. Nostrand*, 46 N. Y. 375, it was held that where proceedings for a peremptory writ were commenced by an order to show cause containing the usual clause, "or for other relief," the court has power to grant any relief to which the party is entitled, though not that specified in the order. In the alternative writ, the relator must set forth the facts on which he relies, and it should contain no allegations except such as are pertinent to the relief asked, and the same certainty of statement is required as in a complaint. *People v. Supervisors of Westchester*, 15 Barb. 607; *People v. Ransom*, 2 N. Y. 490; *People v. Ovenshire*, 41

How. 164; *People v. Green*, 58 N. Y. 295. It is said the relator can only obtain the relief asked. *People v. Supervisors of Dutchess*, 1 Hill, 50; *People v. Supervisors*, 12 Barb. 446. See *People v. Nostrand*, *supra*. If the papers fail to show the relator's title, it is fatal even on appeal. *People v. Board of Appraisement*, 64 N. Y. 627; *People v. Green*, 58 id. 295. Where the relator takes no issue upon the allegations of defendant's affidavits, but proceeds to argument and asks for a peremptory writ, it is equivalent to a demurrer, an admission of the truth of the facts, but a denial of their sufficiency in law. *People v. Supervisors*, 73 N. Y. 173; *People v. Becker*, 3 State Rep. 202; *People v. Board of Apportionment*, 64 N. Y. 627; *People v. Cromwell*, 102 id. 477. And where the defendant takes no issue, he is regarded as demurring. *People v. Supervisors*, 103 N. Y. 541. Where a demurrer is made to a return, defendant may still have judgment, notwithstanding its insufficiency, if the writ is defective. *People v. Supervisors*, 32 Barb. 473. As to when direction in writ is sufficiently definite, see *People v. Rochester & S. R. R.*, 76 N. Y. 294; *People v. Dutchess & Col. R. R. Co.*, 58 id. 152. Variance between declaratory and mandatory parts of alternative writ held amendable. *People v. Earle*, 47 How. 370. As to such variance, see *Green v. Dutchess & Col. R. R. Co.*, 58 N. Y. 152.

§ 2077. The provisions of chapter sixth of this act, relating to the form and contents of an answer, containing denials and allegations of new matter, except those provisions which relate to the verification of an answer, and to a counter-claim contained therein, apply to a return to an alternative writ of *mandamus*, showing cause against obeying the command of the writ. For the purpose of the application, each complete statement of facts, assigning a cause why the command of the writ ought not to be obeyed, is regarded as a separate defense, and must be separately stated and numbered.

The return to an alternative writ of *mandamus* must deny the material facts stated in the writ, or some of them, or allege other and additional facts, which in law would defeat relator's claim. *People v. Supervisors*, 32 Barb. 473; *Commercial Bank of Albany v. Canal Commissioners*, 10 Wend. 25; *People, ex rel., v. Supervisors*, 14 Barb. 52; *People, ex rel., v. Commissioners*, 11 How. 89. The return should conform to the rules of pleading and be positive rather than argumentative and evasive, and the familiar rule in pleading that the evidence should not be set out, should be followed. *People v. Ransom*, 2 N. Y. 496; *People v. Baker*, 35 Barb. 105; *People v. Supervisors*, 18 How. 152; *Matter of Trustees of Williamsburgh*, 1 Barb. 34. Any number of facts constituting valid reasons for not performing the act which the writ seeks to compel,

may be averred. *People v. Supervisors of Ulster*, 32 Barb. 473. An equivocal return, or one pleading a statute, but substantially departing from the requirement of the statute, is not enough. *People, ex rel. Waller, v. Board of Supervisors*, 56 N. Y. 249.

Where an allegation in the affidavit of relator in proceedings for *mandamus* was not put in issue by the return by a positive denial, but only upon information and belief, it was held, that this was not sufficient, but it should have been certain, and of such a nature as, if false, would have permitted of a remedy by action. *People, ex rel. Kelly, v. Common Council of Brooklyn*, 77 N. Y. 503. This decision was made in 1879 under the old Code. Where the allegations in the return were positive and those in the affidavit of relator on information and belief, the writ was denied. *People v. Green*, 1 Hun, 1. In fine the return must, as is said by Bockes, J., in 35 Barb. 105, be good, tested by the ordinary rules of pleading, both in form and substance. The remedy for a bad pleading in a return is motion to strike out as surplusage or other pertinent ground. An allegation as to matter of law is not proper in the return which should only set out facts, not legal principles, and where the statements of fact are outside of the issue and irrelevant to it and contain more than a substantial statement of the relevant facts, they are not proper. *People v. Ransom*, 2 N. Y. 496; *People, ex rel., v. Commissioners*, 11 How. 89. The return has in practice been verified, as it is an answer to a writ granted on a verified petition, but the section does not seem to require it. Where fraud or collusion are set up in the return to avoid relator's case, the facts should be fully pleaded. *People v. Schuyler*, 51 How. 461. On return to an alternative writ facts material to the issue occurring after the granting of the writ may be pleaded. *People v. Baker*, 14 Abb. 19. In *People, ex rel., v. Board of Assessors*, 7 Hun, 228, it was held that where the writ was granted on facts positively averred in the affidavits, and the defendant in the return made denial on information and belief, that it amounted to nothing, that the form of denial was used in pleading to raise an issue, but not for any other purpose. This must be considered in connection with the fact that the present section does not seem to require a verification. Before the Code it was held the court might require a verification or not, and that it need not be signed by the party making it; and if made by a corporation, need not be signed by the head of it, or sealed with the corporate seal. *Fish v. Weatherwax*, 2 Johns. Cas. 215. The making of a false return renders the deponent liable for damages occasioned thereby. In *People v.*

Supervisors of Richmond, 28 N. Y. 112, where supervisors had made a false return to a writ sued out by an individual and the relator had thereby been deprived of damages against a town, the supervisors were held liable for damages to the extent of interest on the amount of damages finally assessed. A *mandamus* will issue to compel a judge to sign a bill of exceptions, but not to settle it in a particular manner when there is a dispute as to the incidents of the trial. *Tweed v. Davis*, 1 Hun, 252. For precedent for return to alternative writ, see section 2082.

§ 2078. A person, who has made a return to an alternative *mandamus*, cannot be compelled to make a further return. The people, or the relator, may demur to the return, or to any complete statement of facts therein separately assigned as a cause for disobeying the command of the writ, on the ground that the same is insufficient in law, upon the face thereof.

This section overrules, 9 Wend. 429, follows the rule laid down in *People v. Ovenshire*, 41 How. 164. The provision as to demurring is in accordance with *People, ex rel., v. Baker*, 35 Barb. 105. There is no provision in the Code to compel a return, and it seems unnecessary, as the command of the writ is to perform the act or show cause to the contrary; and in case of failure to do either, the defendant is liable for a contempt upon the issuing of a peremptory writ and failure to obey its direction.

§ 2079. An issue of fact arises upon a denial, contained in the return, of a material allegation of the writ, or upon a material allegation of new matter, contained in a return; unless a demurrer thereto is taken. Where the people or the relator demur to a complete statement of facts, separately assigned as cause for disobeying the command of the writ, an issue of fact arises, with respect to the remainder of the return.

It was held in *People v. Board of Metropolitan Police*, 26 N. Y. 316, that if the relator took issue upon the facts in a return, he could not afterward question their sufficiency as matter of law, and that if the verdict is against him on the facts the writ must be refused. This was under the practice requiring either a demurrer or plea, and as the necessity for a plea is abrogated by this section and an issue of fact raised on the alternative writ and return, it is more than doubtful whether a mere omission to demur would concede the sufficiency of the return as matter of law, and prevent the relator on the trial from insisting that the facts stated in the return did not constitute a defense. A relator who takes no issue on the affidavits of defendant but asks for a peremptory writ is regarded as interposing a demurrer. *People v. Supervisors*, 73 N. Y. 173; *People v. Board of Apportionment*, 64 id. 627; *People v. Becker*, 3 State Rep. 102; *People v. Cromwell*, 102 N. Y. 477. The averments of the writ cannot be supported by the papers on which it is granted.

People v. Supervisors, 15 Barb. 607; *People v. Baker*, 14 Abb. 19; S. C., 35 Barb. 104.

§ 2080. Oral pleadings upon a writ of *mandamus* are abolished, and no pleadings are allowed, except as prescribed in the foregoing sections of this article. The provisions of title second of chapter sixth of this act apply to the writ and the return; except that it is not necessary to serve a copy of either upon the attorney for the adverse party, or to verify either, and that neither can be amended, without special application to the court, or stricken out as sham.

Title second of chapter sixth is entitled "Pleadings in Courts of Record," including counter-claims, and includes sections 478 to 546.

§ 2081. Where a return to an alternative writ of *mandamus* has been filed, the attorney for the defendant making it must serve upon the attorney for the people or the relator, a notice of the filing thereof. Where the people or the relator demur to the return, or to a part thereof, a copy of the demurrer must be served upon the attorney for the defendant, within twenty days after the service of such a notice. Where the defendant demurs to the writ, or to a part thereof, a copy of the demurrer must be served upon the attorney for the people or the relator, within the time prescribed by law for filing it.

§ 2082. Except as otherwise expressly prescribed in this act, the proceedings, after issue is joined upon the facts or upon the law, are, in all respects, the same as in an action; and each provision of this act, relating to the proceedings in an action, apply thereto. For the purpose of the application, the writ, the return, and the demurrer are deemed to be pleadings in an action; and the final order is deemed to be a final judgment, and may be entered and docketed, and enforced, with respect to such parts thereof as are not enforced by a peremptory *mandamus*, as a final judgment in an action. But before the final order can be docketed, or an execution issued thereupon, an enrollment must be filed thereupon as a judgment-roll in an action. For that purpose, the clerk must attach together, and file in his office, a certified copy of the final order; the writ and the return, or copies thereof; together with the same papers, which are required by law to be incorporated into a judgment-roll in an action. Where the final order is in favor of the people or the relator, it must award a peremptory *mandamus*, to be forthwith issued.

The following precedents are given for proceedings on writ of alternative *mandamus*, from case arising as to legislative printing, and are here grouped for convenience instead of being given under separate sections. They give the proceedings where a peremptory writ is asked for and an alternative writ awarded.

Petition for Writ.

To the Supreme Court of the State of New York:

The petition of the Argus Company respectfully shows:

I. That it is a corporation duly organized, and existing under and by virtue of the laws of this State.

II. That heretofore, and at least twenty days previous to the 15th day of December, 1885, the comptroller and secretary of the State caused to be published, as provided for in section 1 of chapter 215 of the Laws of 1881, a notice that sealed proposals would be received for doing the public or legislative printing for two years, from January 1, 1886.

That during the time when such publication was made, and down to and including December 31, 1885, Joseph B. Carr was such secretary of State, and Alfred C. Chapin was comptroller of the State of New York.

That said secretary and comptroller duly met at the time appointed and opened the bids received pursuant to said notice, and said public officers could not agree upon the person or corporation to whom the award for such printing should be made.

That on the 31st day of December, 1885, the said secretary and comptroller could not come to an agreement, and on said date the terms of office of said secretary and comptroller expired. That on the 1st day of January, 1886, Frederick Cook was the duly qualified secretary of State and the successor of said Carr as such secretary, and Alfred C. Chapin, the duly qualified comptroller of said State and his own successor in said office. That on said 1st day of January, 1886, the said secretary of State and said comptroller met and considered such bids, and awarded and executed the contract for doing the public and legislative printing for the term of two years, from January, 1886, to the relator.

A copy of said contract which was duly executed by the relator is hereto annexed and marked "A," and forms a part hereof.

III. That by the statutes of this State, especially chapters 215 and 621 of the Laws of 1881, it is among other things therein provided that it should be the duty of the person to whom the contract to do the public or legislative printing should be awarded, to print seven hundred and nineteen copies of the journals of each house, as the same shall from time to time be delivered to him by the clerks of the senate and assembly respectively.

Also to print seven hundred and nineteen copies of the messages from the governor, reports of standing or select committees, and reports and communications made in pursuance of laws, or of a resolution of either house, which matters are generally known as "documents," whenever ordered by the house to which such message, report or communication shall be made. Also to print for the use of the members of the legislature during its session, six hundred and forty copies of every bill, the printing of which shall be ordered by either house. And it was further provided that the said bills and journals should be printed and distributed by the said printer within forty-eight hours after the same were placed in his hands.

That Charles A. Chickering is the clerk of the assembly of this State, and has the custody, control and possession of the bills introduced in the assembly and ordered printed, and is the keeper and custodian of the journal of the assembly; that since the making of the said contract with the petitioner the said clerk has kept and has in his possession the journal of the assembly of this State, and various bills introduced into that body ordered to be printed, and numerous messages, reports and documents duly ordered to be printed; that the petitioner is advised by his counsel that it is the duty of said clerk to deliver the said journal and the said bills and documents to the petitioner to be printed under its contract, and that it is a matter of public concern that such matter be promptly printed under the contract and by the petitioner.

IV. That said Charles A. Chickering has been heretofore duly requested by your petitioner to deliver and convey to it the journals, bills

and "documents" of said body, and the materials and "copy" thereof and therefor, for the printing of the same in accordance with said contract, but he has refused and neglected so to do, and still neglects and refuses to do so, in neglect and violation of his duty.

Wherefore, your petitioner asks that a peremptory writ of *mandamus* may issue out of this court, directed to said Charles A. Chickering, clerk of the assembly of this State, and his assistants and subordinates, to deliver, or cause to be delivered to your petitioner, the journals, bills and documents of said body, and the material and "copy" thereof and therefor, for the printing and delivery of the same in accordance with the provisions of said contract.

Dated ALBANY, *Feb'y* 17, 1886.

THE ARGUS COMPANY,
per W. H. JOHNSON, *Manager*.

(*Add verification as to complaint.*)

Order to Show Cause.

SUPREME COURT.

In the Matter of the Application of the
Argus Company for a Writ of *Man-*
damus.

On the foregoing papers let Charles A. Chickering, clerk of the assembly of the State of New York, show cause at a Special Term of the Supreme Court to be held at the chambers of Mr. Justice Ingalls, in the city of Troy, on the first Monday of February, 1886, why a writ of peremptory *mandamus* should not issue out of this court, directing him and his assistants and subordinates, and all, each and every person who acts in that capacity, to deliver to the Argus Company, the petitioner herein, the bills, journals and documents of the assembly of this State, and the material and "copy" thereof and therefor for the printing of the same, in accordance with the requirements of the law, or for such other and further order in the matter as to the court may seem proper.

Service of this order less than eight days, and on or before the 29th day of January, 1886, to be sufficient.

ALBANY, *Jan'y* 28, 1886.

R. W. PECKHAM,
Justice Supreme Court.

Affidavit to Oppose Application for Peremptory Writ.

SUPREME COURT.

In the Matter of the Application of the
Argus Company for a writ of *Man-*
damus.

CITY AND COUNTY OF ALBANY, *ss.*:

John D. Parsons, of said city and county, being duly sworn, says that he denies that a copy of the contract annexed to the petition herein was duly or legally executed or signed by the Hon. A. C. Chapin, comptroller, or Frederick Cook, secretary of State, or by said Argus Company, or that the same is a legal or valid contract.

Deponent further alleges and states that the comptroller signed and executed said contract December 31, 1885; that the secretary of State did not become such or sign said contract until January 1, 1886; deponent further denies that after said secretary of State became such, the secretary of State and comptroller met and considered the said contract, or the propriety of making the same, or the facts relative to the propriety of making the same, as they were required by law to do, and alleges that they did not meet and consider said contract or the propriety of making the same, or the facts relative thereto or affecting the same.

That these denials and allegations are made upon information and belief, and upon statements and evidence under oath, by said comptroller and secretary of State as witnesses before joint committees of the senate and assembly.

That the firm of Weed, Parsons & Co. duly made and delivered to the secretary of State and comptroller, on or about the 15th day of December, 1885, sealed proposals for the printing provided to be done under the said law of 1881, for two years, commencing on the first day of January thereafter, in accordance with the said law and the advertisement for proposals; that the amount of their said bid and proposals is correctly stated in schedule "A," and under and following their name, which bid and proposal of said firm was the lowest offer or bid to do such printing of any of the offers or bids delivered to or received by the said secretary of State and comptroller therefor. That said Weed, Parsons & Co. gave security in a bond to the people of the State of New York, to the satisfaction of the secretary of State and comptroller, for the faithful performance of the contract for such printing.

(*Jural.*)

(*Signature.*)

Order for Alternative Writ of Mandamus.

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 23d day of February, 1886:

Present — Hon. William L. Learned, *Justice*.

In the Matter of the Application of the
Argus Company for a Writ of *Mandamus*.

aget.

Charles A. Chickering, as Clerk of the
Assembly of the State of New York.

On reading and filing the petition, order to show cause, orders of adjournment to this term and amended petition on the part of the petitioner, and the affidavits of John W. Vrooman and Charles A. Chickering and John D. Parsons, and after hearing Samuel Hand and S. W. Rosendale, for the petitioner; Hamilton Harris and N. C. Moak, for the defendants, opposed; it is

Ordered, that an alternative *mandamus* issue out of and under the seal of this court, directed to said defendant, commanding him and his assistants and subordinates to deliver, or cause to be delivered to the Argus Company, the relator, the journals, bills and documents of the assembly and senate respectively, and the material or "copy"

thereof and therefor, for the printing and delivering of the same in accordance with the provisions of the contract in the petition referred to.
Enter in Albany county.

W. L. LEARNED,

Justice Supreme Court.

Alternative Writ.

The People of the State of New York, on the relation of the Argus Company, to Charles A. Chickering, Clerk of the Assembly of the State of New York, greeting:

WHEREAS, As is alleged by the Argus Company of the city of Albany (here insert substantially and in form, as in a pleading, the allegations of the petition, by which the proceeding was commenced); and

WHEREAS, An order was made by this court, on the 28th day of January, 1886, commanding you to show cause, why a writ of peremptory *mandamus* should not issue out of this court, directing you to comply with the prayer of the petition made by said Argus Company (recite prayer); and

WHEREAS, On the 23d day of February, 1886, you filed affidavits in this court denying some of the material facts set out in such petition, and an order was, therefore, made, directing that an alternative writ of *mandamus* issue as therein set forth at length:

Now, therefore, we being willing that full and speedy justice be done in this behalf to it, the Argus Company, do, therefore, command you, that immediately after the receipt of this writ, you, your assistants and subordinates deliver, or cause to be delivered, to the Argus Company, the relator, the journals, bills and documents of the assembly, and the matter or "copy" thereof and therefor, for the printing and delivery of the same, in accordance with the provisions of the contract in the petition referred to; or that you show cause why the command of the writ ought not to be obeyed, and that you make return of this writ, pursuant to section 2072 of the Code of Civil Procedure, within twenty days after service hereof upon you, lest complaint shall again come to us by your default.

Witness, Hon. William L. Learned, justice of the Supreme [L. s.] Court, at the court-house in the city of Albany, on the 23d day of February, 1886.

ROBERT H. MOORE,

ROSENDALE & HESSBERG,

Clerk.

Attorneys for Petitioner.

Indorsed:—"By order of the court."

ROBERT H. MOORE, *Clerk.*

Return to Alternative Writ of Mandamus.

The People of the State of New York,
ex rel. the Argus Company,
agst.

Charles A. Chickering, as Clerk of the
Assembly of the State of New York.

Charles A. Chickering, clerk of the assembly of the State of New York, returns and answers to the alternative writ of *mandamus*, a copy of which is hereto annexed, that (here insert facts set out in affidavits in answer to application for peremptory writ).

Wherefore, this defendant asks that the prayer of the petitioner, as set forth in the alternative writ, be denied and the proceedings dismissed.

CHARLES A. CHICKERING.

HARRIS & RUDD, *Defendant's Attorneys.*

Decision on Trial.

At a term of the Circuit Court of, in and for the county of Albany, held at the city of Albany, on the 16th day of December, 1886:
Present — Hon. Charles R. Ingalls, *Justice.*

The People of the State of New York,
on the relation of the Argus Com-
pany.

agst.

Charles A. Chickering, as Clerk of the
Assembly of the State of New York.

The above-entitled proceeding having been reached in its order on the calendar, and a jury trial having been waived by the parties, Messrs. Rosendale & Hessberg, and E. Countryman, Esq., appearing for the relators, and Hamilton Harris and N. C. Moak, Esq., appearing for the defendants, the relator having presented and rested his case, and the defendant having rested his case, and the facts being all presented to the court, and the proceedings having been tried and submitted, I do find and decide as follows :

FACTS.

I. That the allegations in the alternative writ of *mandamus* are correct and true, and the facts are therein correctly set forth.

II. That the legislative printing for 1886 was done by Weed, Parsons & Co., under and pursuant to the resolutions respectively of the senate and assembly, pending the determination of the questions involved in these proceedings. The said Weed, Parsons & Co. claimed to have a contract for legislative printing signed by Joseph B. Carr, secretary of State, on December 31, 1885, which paper was introduced and read in evidence, signed by said Carr.

III. That provisions are now made by law for future legislative printing, after the expiration of the present contract, different from that under which the contract in question was made.

CONCLUSIONS OF LAW.

That plaintiff, relator in the above-entitled proceeding, is entitled to, and that a peremptory writ of *mandamus* forthwith issue in the above-entitled proceeding to the defendant and his successors in office, requiring and commanding them to deliver for and during the year 1887, to the Argus Company, under and pursuant to the contract referred to in the alternative writ herein, with said Argus Company, all matter and copy for the printing to be done under said contract and pursuant to law.

CHARLES R. INGALLS,
Justice Supreme Court.

Final Order for Peremptory Mandamus.

At a Special Term of the Supreme Court, held in and for the county of Albany, on the 16th day of December, 1886:

Present — Hon. Charles R. Ingalls, *Justice*.

The People of the State of New York,
on the relation of the Argus Com-
pany,

agst.

Charles A. Chickering, as Clerk of the
Assembly of the State of New York

The above-entitled proceeding having been reached in its order on the calendar, at a Circuit Court held this day, in and for the county of Albany, and a jury trial having been waived by the parties, Messrs. Rosendale & Hessberg and E. Countryman, Esq., appearing for the relator, and Hamilton Harris and N. C. Moak, Esq., appearing for the defendants, the relator having presented and rested his case, and the defendant having presented his case, and the facts having been all presented to the court, and the decision of Hon. C. R. Ingalls, justice presiding at said court, and who tried said proceedings, being now duly presented and filed, whereby he finds that relator is entitled to a peremptory *mandamus*; and it appearing that the legislative printing for 1886 was done by Weed, Parsons & Co., under and pursuant to the resolutions, respectively, of the senate and assembly, pending the determination of the questions involved in these proceedings, and provision being now made by law for future legislative printing after the expiration of the present contract, different from that under which the contract in question was made: It is on motion of Rosendale & Hessberg, attorneys for said relator, Messrs. Harris and Moak, aforesaid, appearing for defendants:

Ordered, that a peremptory writ of *mandamus* forthwith issue in the above-entitled proceeding to the above defendant and his successors in office respectively, requiring and commanding them to deliver, for and during the year 1887, to the Argus Company, under and pursuant to the contract referred to in the alternative writ herein with said Argus Company, all matter and copy for the printing to be done by said company under said contract, and pursuant to law.

Enter.

C. R. INGALLS,

Justice Supreme Court.

The peremptory writ is in the form hereinbefore given, and is, therefore, omitted. Of course recitals should be made of proceedings on alternative writ. All the material allegations of the alternative writ not traversed, denied or avoided, are to be taken as admitted, and if the return contains no sufficient answer, the relator is entitled to the writ. *People v. Ovenshire*, 41 How. 164. This is of course subject to the rule that the relator is not entitled to a peremptory *mandamus*, even upon a verdict in his favor on issue joined on return to an alternative writ, when the record shows he

has no legal right thereto on the facts. *People v. Batchellor*, 53 N. Y. 128, limiting *People v. Metropolitan Police*, 26 id. 316. The defendant can at any time before the peremptory writ object to any defect of substance. *Id.*; *People v. Green*, 58 N. Y. 295; *Commercial Bank v. Canal Commissioners*, 10 Wend. 25. A public officer, who, in his return, bases his resistance to the payment of a claim on one ground is estopped from setting up others. *People v. Green*, 64 N. Y. 699. The death of one of several copartners does not abate the writ when they are petitioners, and it occurs after return. *People v. Supervisors*, 70 N. Y. 228.

§ 2063. An issue of fact, joined upon an alternative writ of *mandamus*, must be tried by a jury, as if it was an issue joined in an action specified in section nine hundred and sixty-eight of this act; unless a jury trial is waived, or a reference is directed by consent of parties. Where the writ was issued upon the relation of a private person, the relator or the defendant is entitled to a verdict, report, or decision, where he would be entitled thereto, if the issue was joined in an action, brought by the relator against the defendant, to recover damages for making a false return.

The relators hold the affirmative of the issue. *People v. Tyner*, 24 Barb. 348. When issues upon the return to a writ of alternative *mandamus* are submitted to a jury the jury may render a general verdict, instead of finding on the specific issues; such a verdict is a finding in favor of the party upon each of the issues made; and in case such a verdict is directed by the court it will be presumed to have been rightfully directed in the absence of any evidence to the contrary; and when there is no evidence upon an issue before the jury, or the weight of evidence is so decidedly in favor of one side that the court would set aside the verdict as against evidence, if rendered, it is the duty of the judge to direct the jury what verdict to render. *People v. Board of Metropolitan Police*, 35 Barb. 644. Where, upon application for a peremptory *mandamus* on a false return, the material issues were found in favor of plaintiff, the court held that the judgment should be that a peremptory *mandamus* issue to the defendants, commanding them to audit a claim as commanded by the alternative writ. *People v. Supervisors of Richmond*, 28 N. Y. 112. It was held under former Code, in 35 Barb. 644; on appeal, 26 N. Y. 316, that although issues of fact had been tried by a jury, the court may grant or refuse the writ, as it deems proper. Where the fact on which the right to a peremptory *mandamus* depends is controverted, the issue must be tried before the peremptory writ can issue, and the trial must not be on conflicting affidavits, but by a jury. *People v. Green*, 1 Hun, 1. But if the

return shows the examination of a long account is involved, a compulsory reference may be ordered. *People v. Wadsworth*, 61 How. 57. The issues of fact arising upon the return to the writ may be brought on in the usual manner, and a motion to settle issues is not necessary. The return is to be treated in all respects like the answer to a complaint, to which no reply is required. The old rule, that by not pleading to a return the relator admits its truth, is abrogated. *People v. Order of the American Star*, 53 N. Y. Super. 66.

§ 2084. An issue of fact, joined upon an alternative writ of *mandamus*, granted at a Special Term of the Supreme Court, is triable in the county wherein it is alleged in the writ that the material facts took place, unless the court directs it to be tried elsewhere. An issue of fact, joined upon an alternative writ of *mandamus*, granted at a General Term, is triable in the county, which determines the judicial department, wherein the application for the writ must be made; unless the General Term directs it to be tried in another county of the same judicial department. Where the writ was granted at the General Term, the General Term may detail a General Term justice, of the same or another judicial department, to preside at the trial. Upon the trial of an issue of fact, joined upon an alternative writ of *mandamus*, the verdict, report, or decision must be returned to, and the final order thereupon must be made by, the General or the Special Term, as the case requires.

§ 2085. An issue of law, joined upon an alternative writ of *mandamus*, granted at the General Term, must be tried, and the final order thereupon must be made, at the General Term.

§ 2086. Where an alternative writ of *mandamus* has been issued, costs may be awarded, as in an action; except that, upon making a final order, the costs are in the discretion of the court. Where a peremptory *mandamus* is granted, without a previous alternative *mandamus*, costs, not exceeding fifty dollars and disbursements, may be awarded to either party, as upon a motion.

Costs will not ordinarily be given against an officer acting in good faith. *People v. Brinkerhoff*, 68 N. Y. 259. It was held at Special Term, in *People v. Produce Exchange*, 64 How. 523, that under this section only motion costs could be allowed, where a peremptory *mandamus* is denied without an alternative writ. In *People, ex rel. Bray, v. Board of Supervisors of Ulster County*, 65 How. 327; and on appeal in same case to General Term, Third Department, affirmed, 31 Hun, 88, it was held that full costs as of an argument, and not costs of non-enumerated motion were to be allowed at General Term, and that this section does not apply to costs on appeal. The equity of each case will govern the allowance of costs, and when the order is silent as to costs they will not be allowed. *People v. Densmore*, 1 Barb. 557; *People v. Supervisors of Dutchess*, 3 How. 380. It is not the practice, upon awarding a peremptory writ, to grant costs against judges or other subordinate courts, or other public officers intrusted with the discharge of judicial duties. *Hecox v. Ellis*,

19 Wend. 157. Nor against any public officer, when it appears his refusal to comply with the demand of the relator was conscientious, and founded on reasonable grounds. *People v. Flagg*, 5 Abb. 232. But when judges make a return it has been held otherwise, on the ground that they are then presumed to be indemnified by the party in interest. *People v. Common Pleas*, 18 Wend. 534. It was held in 1874, in *People, ex rel. City of Lockport, v. Supervisors of Niagara*, 50 How. 353, that costs on final determination on a trial of *mandamus* were to be taxed according to Laws of 1844, chap. 273. As to the present practice, see Code of Procedure, §§ 3240 and 3258 as to double costs. It is not sufficient to render one, not a party to the record, liable for costs, that the return was made at his request, and that he opposed the issuing of the peremptory writ. *People v. Common Pleas*, 2 Wend. 301. But a party resisting a *mandamus* by requiring the relators to plead or demur, and subsequently joining in demurrer, is liable to costs of the demurrer if relator has judgment. *People v. Common Pleas*, 3 Wend. 304. Costs should follow the denial of a motion for a writ where the defendant opposed, and the law is plain against the relator. *People v. Colburn*, 20 How. 378. A public officer is entitled to double costs where he succeeds upon proceedings. *People v. Colborne*, 20 How. 378. It was held under the former Code that when an alternative writ was awarded and return made and trial had, costs should be taxed according to the fee-bill under the Revised Statutes. This section, of course, determines the practice and conforms the fee-bill to the Code, as in other cases.

§ 2087. An appeal from an order granting a peremptory writ of *mandamus*, where an alternative writ of *mandamus* was not previously issued, must be taken as from a final order made in a special proceeding. An appeal from a final order, made upon an alternative *mandamus*, must be taken as an appeal from a judgment; and each provision of law relating to an appeal from a judgment, either to the General Term or to the Court of Appeals, is applicable thereto. But where an appeal is taken, as prescribed in this section, from an order of the General Term, granting a peremptory *mandamus*, made upon an original application, or from a final order made upon an alternative *mandamus* granted at the General Term, the execution of the order appealed from shall not be stayed, except by the order of the same General Term, made upon such terms, as to security or otherwise, as justice requires.

Where the Special Term denies a peremptory writ of *mandamus* on the specific ground mentioned in the order that the relator can maintain an action at law on his demand, the General Term, on appeal, is not restricted to that ground, if there is any other proper ground for denial appearing in the papers. *People, ex rel. Bagley*,

v. *Green*, 1 Hun, 1. Where one of the claimants for property in the sheriff's possession moves for a *mandamus* against the sheriff to compel him to deliver it, and is opposed by the sheriff with an affidavit of the other claimant, such other claimant cannot appeal, not being a party to the record, even though he was recognized as an appellant at General Term. *People, ex rel. Lee, v. Lynch*, 54 N. Y. 681. Where the facts give the court jurisdiction, granting or refusing the writ is so far discretionary, that the Court of Appeals will not ordinarily review the exercise of discretion. *In re Sage*, 70 N. Y. 220; *People v. Ferris*, 76 id. 326; *People v. Campbell*, 72 id. 496. And in such a case no appeal lies, unless the discretion of the General Term has been abused. *In re Dederick*, 77 N. Y. 595; *People v. Clyde*, 69 id. 603; *People v. Thompson*, 99 id. 641. This rule is not in conflict with the principle asserted in *People, ex rel., v. Metropolitan R. R. Co.*, 26 Hun, 82, that judgment adverse to relator not disposed of on mere grounds of discretion, but on the merits, is reviewable by the Court of Appeals. But if a motion for a peremptory writ on answering affidavits is absolutely denied, a subsequent motion to modify the order, so as to permit an alternative writ to issue, is addressed to the discretion of the court, and not reviewable in the Court of Appeals. *People, ex rel. Ins. Co., v. Fairman*, 91 N. Y. 385. A party who has obtained an extension of time to comply with a *mandamus* cannot thereafter appeal. *People v. Rochester R. R.*, 15 Hun, 188. Where the General Term erroneously ordered a peremptory *mandamus* for payment of the whole of a claim, the Court of Appeals allowed an alternative writ to try the disputed questions. *People v. Schryver*, 69 N. Y. 242. A party on appeal cannot successfully urge that the delay occasioned by his action in appealing will render the writ unavailing if issued. *People v. Contracting Board*, 46 Barb. 254. It is said that when an application is made for a *mandamus* a respondent may move to vacate former orders granting the writ, though the time to appeal from them has passed. *People v. Cooper*, 24 Hun, 337. On appeal from an order adjudging one guilty of contempt in not obeying the writ, the question as to the propriety of granting the writ cannot be considered. *People v. Rochester R. R. Co.*, 76 N. Y. 294. An appeal to the Court of Appeals from an order of the General Term affirming an order of the Special Term, granting a peremptory writ of *mandamus*, is taken as from a final order made in a special proceeding, and not as from a judgment. *People, ex rel. Collins, v. Spicer*, 34 Hun, 584. An appeal lies to the General Term from the order or judgment of the Special Term. *People v.*

Schoonmaker, 19 Barb. 657. And from the General Term to the Court of Appeals. *People v. Church*, 20 N. Y. 529; *People v. Supervisors*, 45 id. 196; *People v. Hawkins*, 46 id. 9; *People v. Nostrand*, id. 375; *Becker v. People*, 18 id. 487. This is true in all cases where the decision does not rest solely in discretion whether the writ was granted on application in the first instance for a peremptory writ, or on granting the peremptory writ after an alternative writ has issued. *People v. Sturtevant*, 9 How. 304; *People v. Lewis*, 28 id. 159, 170. This is a change from the practice previous to the Code. This view is in accordance with the practice as established in the Court of Appeals, that the argument on appeal in *mandamus* cases must be heard as on an appeal from an order, and the appeal does not take its place on the regular calendar, but on the motion calendar, with appeals from orders, and the time given for argument is the same as on appeals from orders. But an appeal to the Court of Appeals from an order of General Term, reversing a judgment of Special Term granting a new trial on alternative writ, after trial of issues of fact, is not an appeal from an order, and should not be brought on as a motion, but should be placed on the general calendar. *People v. Laidlaw*, 102 N. Y. 588.

§ 2088. Where a return has been made to an alternative writ of *mandamus*, issued upon the relation of a private person, the court, upon making a final order for a peremptory *mandamus*, must, also, if the relator so elects, award to the relator, against the defendant who made the return, the same damages, if any, which the relator might recover in an action against that defendant for a false return. The relator may require his damages to be assessed upon the trial of an issue of fact, if the verdict, report, or decision is in his favor. Where he is entitled to a final order, for any other cause, he may require them to be assessed as in an action. Such an assessment of damages bars an action for a false return.

§ 2089. The proceedings upon a writ of *mandamus*, granted at a Special Term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by a judge of the court, but not by any other officer. Where the writ was granted at the General Term, an order staying the proceedings, or enlarging the time to make a return, can be made only by a General Term justice of the same department; and where notice has been given of an application for a *mandamus* at a General Term, or an order has been made to show cause, at a General Term, why a *mandamus* should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.

The application for stay at Special Term may be made on argument, and the stay embodied in the writ; or, the better practice is to enter an order staying proceedings on the writ pending an appeal; or, in case the application is not made until after order entered, it may be made upon an affidavit setting out the facts, and that an appeal has been or is about to be taken. No notice of the application is necessary, unless required by the court to which the application is made.

Precedent for Order Staying Proceedings, Pending Appeal, Made on the Argument.

At a Special Term of the Supreme Court, held at City Hall in Albany,
on the 20th day of December, 1885:

Present — Hon. R. W. Peckham, *Justice*.

SUPREME COURT.

The People of the State of New York
agst.

The Board of Supervisors of the County
of Ulster.

An application having been this day made for a writ of *mandamus* directing the board of supervisors of the county of Ulster to levy and assess on the taxable property of said county the sum of \$28,098, and the same having been granted by order of the court, after hearing I. H. Maynard, deputy attorney-general, for the motion, and J. Newton Fiero, opposed, and it appearing that the defendant is about taking an appeal from said order, on motion of defendant's counsel it is ordered that all proceedings on said writ be stayed until the expiration of the time to appeal from said order, and in case such appeal is taken, then that all proceedings thereon be stayed till the hearing and determination of said appeal.

Enter in Ulster county.

R. W. PECKHAM.

§ 2090. Where a final order awards a peremptory *mandamus* directed to a public officer, board, or other body, commanding him or them to perform a public duty, enjoined upon him or them by special provision of law, if it appears to the court that the officer, or one or more members of the board or body have, without just excuse, refused or neglected to perform the duty so enjoined, the court, besides awarding to the relator his damages and costs, as prescribed in this article, may, in the same order, impose a fine not exceeding two hundred and fifty dollars, upon the officer, or upon each member of the board, who has so refused or neglected. The fine, when collected, must be paid into the treasury of the State; and the payment thereof bars any action for a penalty, incurred by the person so fined, by reason of his refusal or neglect to perform the duty so enjoined.

The writ of *mandamus* is an order of the court within the meaning of the statute; providing for punishment as for a contempt for disobedience of any lawful order of a court of record, and the fine imposed in such a case may include a reasonable compensation for relator's attorney.

The provisions of the Revised Statutes that when a peremptory writ is directed to a public officer or board, requiring them to perform a public duty, and it shall appear they have neglected so to do, a fine of \$250 may be imposed, was not intended to prescribe the punishment for disobeying the writ, but to enforce a fine for past neglect, in addition to awarding the writ. But the directors of a corporation are not a public officer, body or board under this statute. *People v. State Line R. R.*, 76 N. Y. 294.

This decision, although made before the Code, seems still to be in point as the changes made (2 R. S. 587, § 60) by this section are slight and do not seem to affect this question.

In *People v. Supervisors of Delaware*, 45 N. Y. 196, a second writ was served where first writ had not been fully obeyed. For the decisions relating to the right to the writ, and the law governing its allowance, the practitioner is referred to High on Extraordinary Remedies, Moses on Mandamus, and Wood on Mandamus.

CHAPTER V.

THE WRIT OF PROHIBITION.

The writ of prohibition is issued to forbid a court to which it is directed from proceeding in a suit or matter depending before such court upon the ground that the cognizance of such suit or action does not belong to it. Bacon's Abridgment, title "Prohibition."

It is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court, and for the purpose of preventing the inferior tribunal from usurping a jurisdiction which does not belong to it. It is used to keep inferior courts within the limits and bounds prescribed for them by law. *People v. Works*, 7 Wend. 486; *People v. Supervisors*, 1 Hill, 195. And such being its object, its use in all proper cases should, says Judge Selden, in *Quimbo Appo v. People*, 20 N. Y. 531, be upheld and encouraged, since it is of vital importance to the due administration of justice, that every tribunal invested with judicial functions should be confined strictly to the exercise of those powers with which it has been by law intrusted.

It is, however, to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress, and it is a principle of universal application, and one which lies at the very foundation of the writ of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law. *Ex parte Braudlacht*, 2 Hill, 367.

Its office is, says Justice Cowen, in the same case, to prevent courts from going beyond their jurisdiction in the exercise of judicial, not ministerial power; otherwise the writ might be sought whenever a justice of the peace was about to issue civil or even criminal process irregularly.

The writ will only issue to prevent some action "which is contrary to the general laws of the land;" no question but jurisdiction can be tried. Where, however, the statute has imposed restrictions as to the circumstances under which an "inferior court, or judge thereof," may act in matters otherwise within its jurisdiction, and these restrictions are disregarded, the party aggrieved may have a remedy by prohibition. *People v. Nichols*, 79 N. Y. 582.

In *People, ex rel. Adams, v. Westbrook*, 89 N. Y. 152, it is said that the writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity or by appeal, and is not demandable as matter of right, but of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. It does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case which it had a right to adjudicate. In all cases, therefore, where the inferior court has jurisdiction of the matter in controversy, the Superior Court will refuse to interfere by prohibition, and will leave the party aggrieved to procure the ordinary remedies for the correction of errors. *Ex parte Gordon*, 2 Hill, 363; *People v. Seward*, 7 Wend. 518.

It will not go to restrain an inferior court from proceeding on the ground of insufficiency of papers on which process was obtained, since the court itself may afford ample relief by appeal. *People v. Marine Court*, 36 Barb. 341. It will not be granted until it appears that the party aggrieved has applied in vain to the inferior tribunal for relief, and is to be used with great caution and forbearance for the furtherance of justice, and to secure order and regularity in judicial proceedings when ordinary remedies are not applicable. High on Ext. Rem., § 765. It issues only to prevent the commission of an act, and not to undo what has been already performed. *United States v. Hoffman*, 4 Wall. 158.

The writ will run where, as is held by Justice Selden, in *Quimbo Appo v. People*, 20 N. Y. 531, in a matter of which a tribunal has jurisdiction, it goes beyond its legitimate power, and when handling matters clearly within its cognizance, it transgresses the bounds prescribed by law. It lies to prevent the exercise of an unauthorized power in a cause or proceeding of which the subordinate tribunal has jurisdiction, and its scope ought not to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed.

The codifiers, in reporting to the legislature their labors as to this portion of the Code, state that they have only undertaken to reach the methods of procedure, which they found exceedingly cumbersome and intricate, and have confined themselves to simplifying the proceedings, reducing them to order and making them as brief as possible.

Where a remedy exists by appeal or otherwise to correct an error of law or practice, the writ will not be granted. *People, ex rel., v. Clute*, 42 How. 157; *People, ex rel., v. Nichols*, 79 N. Y. 582. It should be issued only in cases of extreme necessity and not for grievances which may be redressed by ordinary proceedings at law, or in equity, or by appeal. *People, ex rel., v. Westbrook*, 89 N. Y. 152. The same principle is decided in the following cases: *People v. Common Pleas*, 43 Barb. 278; *Ex parte Braudlacht*, 2 Hill, 367; *People v. Russell*, 19 Abb. 136; *Sweet v. Hulbert*, 51 Barb. 312; *People v. Marine Court*, 36 id. 341; *People v. Talcott*, 21 Hun, 591. It is not intended to be used to correct errors which may arise on a trial and may be corrected on appeal. *People v. McAdam*, 2 Civ. Pro. 86. It was not intended the writ should be used as a means of interfering with the orderly practice of the courts, or as a method of staying summary proceedings. *People v. Parker*, 63 How. 3; *People v. Rinell*, 19 Abb. 136. It is a preventive and not a corrective remedy. *People v. Commissioners of Excise*, 61 How. 514; *Thompson v. Tracy*, 60 N. Y. 31. The scope of the writ and cases in which it is proper, and principles governing its use are fully discussed in the case last cited, covering very many of the matters heretofore discussed, and the case will be found an authority upon numerous points as to the practice under the writ; among other things, that the Revised Statutes did not change the character of the writ, or permit any question, except that of jurisdiction, to be raised or tried under it. This principle seems to be equally applicable under the present Code. It is further held that an appeal will not be restrained by the writ and that the writ issuing out of the Supreme Court can in nowise affect the practice or jurisdiction of the Court of Appeals, or the rights of the parties to its process or a hearing therein, these questions being for that court to determine. In a recent case reiterating the rule that the writ is not a writ of right and will not be granted in a case where another adequate remedy exists, it was refused against a referee to prevent him from opening a case after it had been submitted. *People v. County Court of Kings*, 23 Week. Dig. 137. The writ lies to restrain proceedings of supervisors, judicial in their nature, under

a notice which confers no jurisdiction. *People v. Supervisors*, 63 How. 411. The writ issues to prevent a court from trying a case between sailors and officers of a foreign vessel where a treaty stipulated what courts should have jurisdiction. *People v. Marine Court*, 6 Hun, 214. It lies to determine the jurisdiction of surrogates of different counties dependent upon the residence of a decedent. *People v. Waldron*, 52 How. 221. It lies to restrain the removal of a city officer by the mayor where he does not possess the power of removal. In such a case the mayor acts judicially. *People v. Cooper*, 57 How. 416. It will also issue to prevent an officer from proceeding under an unconstitutional statute. *Sweet v. Hulbert*, 51 Barb. 312. It will not issue to restrain the board of police justices of New York city in appointing and removing clerks of courts, since in so acting they do not act as a court. *Norton v. Dowling*, 46 How. 7. It will not interfere with the exercise of ministerial as distinguished from judicial powers. *People v. Supervisors of Queens*, 1 Hill, 201; *Ex parte Braudlacht*, 2 id. 367. Nor will it lie on a mere point of practice where the court has jurisdiction of the general subject of the cause. *People v. Marine Court*, 36 Barb. 341; *People, ex rel., v. Oyer and Terminer*, 27 How. 14; *People v. Russell*, 49 Barb. 351; 14 Abb. 266. It will not be granted to a relator who has been aggrieved because of the irregularity of the form of a judgment and who has a plain remedy by application to the court, which rendered it, for correction, even if a court is assuming to act without authority, and the relator can protect himself by proper objections and by exceptions when the case is on trial, and by appeal from the decision. *People, ex rel. Salke, v. Tulcott*, 21 Hun, 591. A writ of prohibition will not issue to prevent a judge of a District Court in New York city from entertaining and acting on an application to open a default taken before him. *People, ex rel. Lumm, v. Langbein*, 12 Week. Dig. 20. There must be a violation of a statutory restriction or an unlawful exercise of jurisdiction; an error in practice affords no grounds for the writ. *People, ex rel. Mayor, v. Nichols*, 79 N. Y. 582. It does not lie when a court has only overruled preliminary objections and the relator can have a remedy against a final order by injunction. *People, ex rel. Cook, v. Parker*, 63 How. 3. The common-law rule that prohibition is a preventive remedy and not a corrective one is said, in *People, ex rel. Gould, v. Commissioners of Excise of New York*, 61 How. 514, not to have been changed by the Code of Civil Procedure. A writ when granted will not operate to restrain the party named

therein generally, or from doing any act save proceeding in the prohibited suit or matter. *Thompson v. Tracy*, 60 N. Y. 31. The writ will not be issued to restrain a surrogate from taking proof of a will offered for probate on the ground that the decedent was not a resident of the county, under the rule that it will not be allowed where the relator has an adequate remedy by appeal. *People, ex rel. James, v. Surrogate of Putnam*, 36 Hun, 218. While a magistrate is proceeding within the scope of his jurisdiction and is chargeable with no malice or misconduct, his proceedings cannot be arrested by the writ of prohibition, however erroneous or irregular his decisions may be. *People, ex rel. Smith, v. Grogan*, 3 N. Y. Crim. R. 335, citing the leading cases. The writ will not issue to determine whether a surrogate is a creditor where citation is issued on his own petition to executors, he acting as receiver and another person acting as surrogate under the statute. This is properly determined on appeal. *People, ex rel. Oakly, v. Petty*, 32 Hun, 443. Where an accused person elects to be tried by court having jurisdiction, a writ of prohibition will not be granted against the court, though its judgment is erroneous, if there is a remedy by appeal. *People, ex rel. Vatham, v. Court of Special Sessions*, N. Y. Daily Register, Jan. 3, 1884.

Summary proceedings.—The writ of prohibition will not issue to restrain summary proceedings where the petition presents facts proper for the consideration of the officer to whom it is directed, but defendant should litigate the matter in the proceeding. *People, ex rel. Browne, v. McAdam*, 2 Civ. Pro. 52. Where the justice has jurisdiction of the case and the subject-matter, prohibition is not proper. *People, ex rel., v. McAdam*, 84 N. Y. 287; reversing 22 Hun, 559.

Where the justice has jurisdiction of the proceedings the writ will not lie to restrain the execution of the warrant to dispossess the tenant, upon the ground of an error of the justice in the proceedings. The remedy is by appeal. Citing *Knox v. McDonald*, 25 Hun, 268; *People v. Letson*, 3 How. (N. S.) 381. Prohibition will lie where, although there is jurisdiction on proper allegations in general, yet there is none on the facts stated in the applicant's affidavit for the order to show cause. The jurisdiction is special and limited, and the magistrate is strictly confined to the terms of the act; a cause must be shown by the papers which is within the statute before the magistrate can act. *People, ex rel., v. McAdam*, 22 Hun, 559, reversed on another point, 84 N. Y. 287, *supra*.

§ 2091. A writ of prohibition is either alternative or absolute. The alternative

writ may be granted upon an affidavit, or other written proof, showing a proper case therefor, and either with or without previous notice of the application, as the court thinks proper.

The Superior Court may issue the writ. *Norton v. Dowling*, 46 How. 7.

Precedent for Affidavit for Writ from General Term.

IN THE SUPREME COURT OF THE STATE OF NEW YORK, } ss.:
City and County of New York,

Edward Cooper, of said city, being duly sworn, says he is mayor of the city of New York. That about March, 1879, certain proceedings were instituted before him for the purpose of investigating the official conduct of Sidney P. Nichols as commissioner of police of said city, and such proceedings were conducted and carried on according to law, and the said Nichols was given an opportunity to be heard before him in relation to said charges. The proceedings before said mayor appear in a copy of his return to writ of *certiorari* hereto annexed. That upon the report of said proceedings to the governor of the State of New York, a writ of *certiorari* was directed to the said governor and mayor, for the purpose of bringing before the Supreme Court for review the proceedings had on such hearing of the charges against said Nichols. That as deponent is informed and believes, no assignment or appointment of any Special Term to be held in the city of New York has been made for the month of September, 1879, and that the right of jurisdiction and review of the decision made on said hearing as to the removal of said Nichols can only be exercised at a regularly appointed term, and not at chambers. That nevertheless Hon. T. R. Westbrook, sitting at Special Term at chambers, did, on September 16, 1879, make an order, of which a copy is hereto annexed, by which deponent is required to show cause, on the 22d day of September inst., before him, the said justice, at Special Term, at chambers, why the so-called judgment in the matter of said Nichols should not be reviewed and declared null and void.

Wherefore deponent prays this court that it will exercise the jurisdiction and authority conferred upon it by law, and issue a writ of prohibition directed to the said Special Term, at chambers, so to be held on September 22, 1879, and to the Hon. T. R. Westbrook, the presiding justice thereat, and to said Sidney P. Nichols, prohibiting the said Special Term at chambers and the said justice from further entertaining or proceeding with the matter of said writ of *certiorari*, or the return thereto, or the matter set forth in said order of September 16, and prohibiting and restraining the said Nichols from bringing into effect or proceeding upon any judgment which may be rendered at said term at chambers, and for such other or further relief as may be just.

EDWARD COOPER.

Sworn to before me, this 19th }
day of September, 1879. }

JOHN TRACY, Notary Public.

Precedent for Petition for Writ to Special Term.

To the Supreme Court of the State of New York:

The petition of Henry C. Adams, of the city of New York, shows

that on or about August 1, 1872, he commenced an action in the Supreme Court against Peter G. Fox, executor of the last will and testament of Archibald Fox, deceased, and Lawrence M. Fox, by the service of a summons and complaint on them, the defendants therein, claiming in said complaint (show facts entitling petitioner to relief and intended action by court).

Wherefore this relator prays that a writ of prohibition be issued out of this court, directed to the Surrogate's Court of Montgomery county, and to Zerah S. Westbrook, surrogate of said county, and to Jacob C. Nellis, executor of the last will and testament of Peter G. Fox, deceased, defendant as aforesaid.

HENRY C. ADAMS.

(Add verification as to pleading.)

§ 2092. Except where special provision therefor is otherwise made in this article, an alternative writ of prohibition can be granted only at a Special Term of the court. In the Supreme Court, the Special Term must be one held within the judicial district, embracing the county wherein the action is triable, or the special proceeding is brought, in the course of which the matter, sought to be prohibited by the writ, originated.

Precedent for Order for Alternative Writ by Special Term.

At a Special Term of the Supreme Court, held at the court-house at Caldwell, in and for the fourth judicial district, on the 21st day of March, 1886:

Present — Hon. Joseph Potter.

The People, *ex rel.* Henry C. Adams,
agst.

Zerah S. Westbrook, Surrogate of the
County of Montgomery, and Jacob
C. Nellis, Executor, etc., of Peter G.
Fox, deceased.

On reading and filing the affidavit of Henry C. Adams it is ordered that a writ of prohibition issue out of this court to the Surrogate's Court of Montgomery county, and Zerah S. Westbrook, surrogate, and to Jacob C. Nellis, executor, etc., commanding the said court to desist and refrain from making any distribution whatever of the funds of the estate of Peter G. Fox, deceased, and from the publication of notice of such distribution to the creditors of said deceased until the final decision of the Supreme Court in the action therein described, and that said writ be returnable on the second Tuesday of April next, at the opening of the court on that day, at the chambers of the Hon. Joseph Potter, at Whitehall.

JOSEPH POTTER, *Justice.*

Form of Alternative Writ of Prohibition.

The People of the State of New York to Zerah S. Westbrook, County Judge and Surrogate of Montgomery County, in said State, and to Jacob C. Nellis, executor of the last will and testament of Peter G. Fox, deceased, greeting :

WHEREAS, Henry C. Adams, of the city of New York, has presented to the Supreme Court of the State of New York, on the 21st day of March, 1886, the fact upon petition and affidavit, and the papers

accompanying the same in printed form, that an action was commenced by him as the plaintiff, by service of a summons and complaint upon Peter G. Fox, executor of the last will and testament of Archibald Fox, deceased, and Lawrence M. Fox, defendants, on or about the 1st day of August, 1872, to recover of Peter G. Fox, personally, the amount due upon three several judgments, viz. : (here state facts as in petition) : Wherefore the said Henry C. Adams has prayed relief of our said court, and our writ of prohibition in that behalf. We, therefore, being willing that the laws and customs of our State should be observed, and that our citizens should in nowise be oppressed, do command you that you desist and refrain from any further proceeding in the matter of exhibiting, proving, examining, deciding upon or intermeddling in any manner with the said claims and demands of the said relators, so pending and undetermined in said action, and awaiting the adjudication and decree of the Supreme Court, and that you make no order, decree, or adjudication in respect to the claims and demands of other creditors of said estate, inconsistent with or in any manner prejudicial to the rights, interests, claims and demands of the said relator, Henry C. Adams, until the final adjudication, decree, or judgment of said Supreme Court, in the said action so pending therein as aforesaid ; and then only in the manner and form, and in accordance with the decree and judgment of the said Supreme Court therein, or the further order of this court.

And also that you desist and refrain from making any distribution whatever of the said funds of said estate, and from publication of notice of such distribution among the creditors of said deceased until the final distribution, decree or judgment of said Supreme Court, in the said action so pending and undetermined therein, as stated, and then only in the manner and form, and in accordance with the decree and judgment of the said Supreme Court therein, or the further order of this court.

And that you show cause on the second Tuesday of April, 1886, at ten o'clock, A. M., of said day, before the Special Term of the Supreme Court of the State of New York, at chambers of Hon. Joseph Potter, in Whitehall, N. Y., why you should not be absolutely restrained from any further proceedings in respect to the said claims and demands of said relator, or the claims and demands of other creditors of said estate, inconsistent with or prejudicial to the said rights, claims and demands of said relator ; and also from making any distribution whatever of the said funds of said estate, and from publication of notice of such distribution among the creditors of said deceased, until the final adjudication, decree, or judgment of the Supreme Court, in the said action so pending and undetermined therein, as aforesaid, or the further order of this court.

Witness, the Hon. Joseph Potter, one of the justices of the [L. s.] Supreme Court, at the court-house, in the county of Warren, the 21st day of March, A. D. 1886. BY THE COURT,

HENRY C. ADAMS, *Relator,*

DANIEL V. BROWN, *Clerk.*

Attorney in Person.

Indorsed :— "The within writ of prohibition is hereby allowed this 21st day of March, 1881, by the court."

JOS. POTTER,
Justice Supreme Court.

§ 2093. An alternative writ of prohibition may be granted at a General Term of the Supreme Court only, directed generally to any judge holding, or to hold, a Special Term of the same court, or directed to one or more judges of the same court, named therein, in any case where such a writ may be issued out of the Supreme Court, directed to any other court, or to a judge thereof. Such a writ can be granted only at the General Term of the judicial department, embracing the county wherein the action is triable, or the special proceeding is brought, in the course of which the matter, sought to be prohibited by the writ, originated, unless the General Term is not in session; in which case it may be granted at the General Term of an adjoining judicial department.

Precedent for Order for Alternative Writ by General Term.

At an extraordinary General Term of the Supreme Court, appointed by the governor of the State of New York, held in and for the first department, at the court-house, in the city and county of New York, on the 20th of September, 1879:

Present — Hon. Noah Davis, *Presiding Justice*; John R. Brady and George C. Barrett, *Justices*.

The People of the State of New York,
on the relation of Edward Cooper,
Mayor of the City of New York,

agst.

The Special Term at Chambers, now
being held in and for the City and
County of New York, in the Court-
House in the City and County of New
York, and against the Hon. Theodo-
ric R. Westbrook, the Justice pre-
siding at said Special Term, and
against Sidney P. Nichols, the relator
in certain proceedings pending in
said Special Term at Chambers.

On reading and filing the affidavit of Edward Cooper, and the papers and proceedings thereto annexed, and the affidavit of William C. Whitney, and upon motion of Francis N. Bangs and Francis C. Barlow, of counsel for the said Edward Cooper, such mayor as aforesaid,

It is ordered by the court now here that the said respondents, the said Special Term at chambers, the Hon. Theodorick R. Westbrook, justice presiding thereat, and Sidney P. Nichols, do show cause before this court on Thursday, the 25th day of September, instant, at the court-house in the city and county of New York, at half-past ten o'clock, or as soon thereafter as counsel can be heard, why a writ of prohibition should not be issued by this court, under and pursuant to the statute, and according to the course and practice of the court, prohibiting and restraining the said Special Term, and the said justice, or any justice presiding thereat, from hearing and determining the questions arising upon the writ of *certiorari* mentioned in the said affidavit of Edward Cooper, and upon the certificate of the said Edward Cooper, filed as the return to said writ of *certiorari*, and from receiving, affirming or reversing the proceedings of the said Edward Cooper, as mayor, therein mentioned,

and from rendering any judgment thereon, and making any further order in respect thereto, and prohibiting and restraining the said Sidney P. Nichols from applying to said Special Term, from any hearing, or determination, or judgment on the said writ of *certiorari* and return thereto, and from carrying into execution or effect any such judgment, order or determination. And it is further ordered that the said Special Term, and the said justice presiding thereat, and the said Sidney P. Nichols, be and they are each of them prohibited and restricted from any and all further proceedings in the matter of said *certiorari*, and from bringing the same to a hearing and trial, and from trying, deciding, or adjudicating the same in any manner or form, until the hearing before the General Term, under this order, and the decision of said General Term, upon such order, except that this order shall not operate to restrain or prevent either party from noticing or bringing to hearing before the General Term any appeal or appeals now pending from orders heretofore made in the said proceedings, or from noticing and putting the said proceeding on the calendar of the October Special Term, for the hearing and trial of issues of law or fact (of which short notice shall be sufficient) so that the same may be brought to a trial or hearing without delay, after the decision of this court upon this order, nor shall it operate to prevent the said Special Term at chambers from adjourning the motions now pending in said proceeding, from time to time, until the hearing and decision under this order. HUBERT O. THOMPSON, *Clerk*.

Precedent for Form of Alternative Writ of Prohibition by General Term.

The People of the State of New York, ex rel. Edward Cooper, Mayor of the City of New York, to the Special Term at Chambers, now being held in and for the City and County of New York, in the court-house in said city, and Hon. Theodoric R. Westbrook, Justice presiding at said Term at Chambers, and Sidney P. Nichols:

WHEREAS, Edward Cooper, lately in our Supreme Court at a General Term thereof, held at the court-house in the city of New York on the 20th day of September, 1879, gave the court to understand, and be informed (here state facts briefly set out in affidavit or petition) as appears by the affidavits of William C. Whitney and Edward Cooper, verified September 20, 1879; and

WHEREAS, It appears by such affidavits that you, the said court at Special Term, you, the Hon. Theodoric R. Westbrook, the presiding justice thereof, are proceeding unjustly to aggrieve and oppress the relator, contrary to law and without jurisdiction, and that adequate and proper relief can only be had by the said Edward Cooper, mayor of the city of New York, by writ of prohibition restraining you and each of you from taking further proceedings in reference to the matters hereinbefore set forth, which relief is asked by the said relator:

We, therefore, do command you, the said Special Term, sitting at chambers, and you, the said presiding justice thereof, and you, Sidney P. Nichols, a party to the proceedings there sought to be had, to desist and refrain (here follow language of order) until the further order of this court thereon, and that you show cause before this court on Thursday, the 25th day of September next, at the court-house in

the city and county of New York, why absolute writ of prohibition should not issue against you, and have you then there this writ.

Witness, Hon. Noah Davis, presiding justice at said General Term, [L. S.] at the court-house in the city of New York, this 20th day of September, 1879.

HUBERT O. THOMPSON,
Clerk.

FRANCIS N. BANGS,

Attorney for Relator.

Indorsed: — "Allowed by special order of the court September 20, 1879."

NOAH DAVIS, *Presiding Justice.*

§ 2094. Except as otherwise specially prescribed by law, an absolute writ of prohibition cannot be issued, until an alternative writ has been issued and duly served, and the return day thereof has elapsed. The alternative writ must be directed to the court in which, or to the judge before whom, and also to the party in whose favor, the proceedings to be restrained were taken, or are about to be taken. It must command the court or judge, and also the party, to desist and refrain from any further proceedings in the action or special proceeding, or with respect to the particular matter or thing described therein, as the case may be, until the further direction of the court issuing the writ; and also to show cause, at the time when, and the place where, the writ is made returnable, why they should not be absolutely restrained from any further proceedings in that action, special proceeding, or matter. The writ need not contain any statement of the facts or legal objections, upon which the relator founds his claim to relief.

§ 2095. The writ must be made returnable, either forthwith or at a day certain, before the term which granted it, or upon the first day of a future term, therein specified, at which application for the writ might have been made. Where it is granted at the General Term of a judicial department, adjoining that wherein the matter originated, it may, in the discretion of the court, be made returnable at the General Term of either department. The writ must be served upon the court or judge, and also upon the party, as prescribed by law for the service of an alternative writ of *mandamus*. A copy of the papers upon which it was granted, must be delivered with each copy of the writ.

A writ was held to be irregularly granted under the former practice, where the order to show cause was not served on the courts to which it was directed, and no appearance was made on their behalf. *Matter of Cameron*, 5 Hun, 290.

§ 2096. Where the alternative writ has been duly served upon the court or judge, or upon the party, the relator is entitled to an absolute writ, unless a return is made by the court or judge, and by the party, according to the exigency of the alternative writ, or within such further time as may be granted for the purpose. The return must be annexed to a copy of the writ; and it must be either delivered in open court, or filed in the office of the clerk of the court issuing the writ; or, in the Supreme Court, the clerk of the county where the writ is returnable. Where the party makes a return, the court or judge must also make a return. In default thereof, the judge, or the members of the court, may be punished, upon the application of the people or of the relator, for a contempt of the court issuing the writ. A return to an alternative writ of prohibition cannot be compelled in any other case.

The peremptory writ follows the general form of the alternative writ, except in final direction to show cause.

§ 2097. An alternative writ of prohibition cannot be quashed or set aside, upon motion, for any matter involving the merits. An objection to the legal sufficiency of the papers, upon which the writ was granted, may be taken in the return. A motion to quash an absolute writ of prohibition, or to set aside an alternative writ, for any matter not involving the merits, must be made at a term where the writ might have been granted.

§ 2098. A return to an alternative writ, when made by a party, must be verified by his affidavit, as required for the verification of a pleading in a court of record; unless it consists only of objections to the legal sufficiency of the papers upon which the writ was granted. Where the party unites with the court or judge in a return, or annexes to the court's or the judge's return, an instrument in writing, subscribed by him, to the effect that he adopts it, and relies upon the matters therein contained, as sufficient cause why the court or judge should not be restrained, as mentioned in the writ, he is thenceforth deemed the sole defendant in the special proceeding; except that where a final order is made, awarding an absolute writ of prohibition, such a writ must be directed to the party, and also to the court or the judge.

Precedent for Return to Alternative Writ by the Court Below.

(Title as above.)

To the Honorable the Supreme Court of the State of New York:

I, Zerah S. Westbrook, surrogate of the county of Montgomery, defendant herein, in answer to the writ of prohibition granted herein March 21, 1881, a copy of which was served on me, and is hereto annexed, and for a return thereto, do hereby certify and return as by law required, as follows:

(Here insert facts.)

Therefore this defendant respectfully denies the right or jurisdiction of your honorable court to grant said writ or to continue the same, or in any way or manner interfere with or control the matters legally pending before him as surrogate, as aforesaid, and he respectfully denies the sufficiency of the papers and proofs on which the same was granted, and asserts that said writ was and is wholly unauthorized, useless and unnecessary.

All of which is respectfully submitted that your honorable court may consider and do as it may seem proper and just in the premises.

In witness whereof, I have hereunto set my hand and official [L. s.] seal this 6th day of April, 1886, at Amsterdam, in the county of Montgomery. Z. S. WESTBROOK, Surrogate.

Return by Party to Alternative Writ.

(Title as above.)

The return of Jacob C. Nellis, to the writ of prohibition granted herein, a copy of which is hereto annexed, denies all and all manner of injury or grievance in said writ alleged, and certifies and returns to the Supreme Court (here state facts, or adopt return of court or judge if facts are stated therein).

Therefore, this defendant relies upon the matters hereinbefore set forth and in the return to said writ by the surrogate of Montgomery county as sufficient cause why the said Surrogate's Court should not be restrained as mentioned in said writ.

Witness my hand this 11th day of April, 1881. JACOB C. NELLIS,
(Add verification.) Executor, etc., of Peter G. Fox, deceased.

§ 2099. Pleadings are not allowed upon a writ of prohibition. Where an alternative writ has been issued, the cause may be disposed of without further notice, at the term at which the writ is returnable. If it is not then disposed of, it may be brought to a hearing, upon notice, at a subsequent term. In the Supreme Court, it must be heard at a General Term of the same judicial department, or at a Special Term held in the same judicial district, as the case may be. The relator may controvert, by affidavit, any allegation of new matter contained in the return. The court may direct the trial of any question of fact by a jury, in like manner and with like effect, as where an order is made for the trial, by a jury, of issues of fact, joined in an action triable by the court. Where such a direction is given, the proceedings must be the same, as upon the trial of issues so joined in an action.

§ 2100. Where a final order is made in favor of the relator, it must award an absolute writ of prohibition; and it may also direct that all proceedings, or any specified proceeding, theretofore taken in the action, special proceeding, or matter, as to which the prohibition absolute issues, be vacated and annulled. The writ of consultation is abolished. Where a final order is made against the relator, it must authorize the court or judge, and the adverse party, to proceed in the action, special proceeding, or matter, as if the alternative writ had not been issued. Costs, not exceeding fifty dollars and disbursements, may be awarded to either party as upon a motion.

The provision as to annulling and vacating proceedings had applies only to interlocutory or mesne proceedings prior to the final decision.

People, ex rel., v. Commissioners of Excise, 61 How. 514.

Precedent for Final Order for Writ.

At an extraordinary General Term of the Supreme Court, held at the court-house in the city of New York, on the 29th day of September, 1879:

Present — Hon. Noah Davis, *Presiding Justice*; Hon. John R. Brady and Hon. George C. Barrett, *Justices*.

The People, *ex rel.* The Mayor of New York,

agst.

Sidney P. Nichols and others.

The order to show cause, made in this matter on the 20th day of September, 1879, having come on to be heard before the said justices now present, at an extraordinary General Term, held at the court-house aforesaid, on the 25th day of September, 1879, upon the papers on which the same was granted, and Mr. Thomas G. Evans having appeared for Mr. Justice Westbrook, and shown cause by reading and filing a statement of facts made by Mr. Justice Westbrook; and Messrs. Townsend and Weed having appeared for Sidney P. Nichols, and shown cause by reading and filing the affidavit of John W. Weed; and Mr. Francis N. Bangs having been heard for the mayor of the city of New York; and Mr. William Allen Butler for Sidney P. Nichols, and due deliberation having been thereupon had:

It is ordered, that there do issue out of this court, and under the seal

thereof, a writ of prohibition in the usual form, addressed to the said Sidney P. Nichols, and to the Special Term and terms appointed to be held at the court-house in the city and county of New York, for non-enumerated motions and chamber business, and the justice and justices presiding thereof; restraining and prohibiting the said Special Term and the said justice and justices from proceeding to entertain or determine any motion or application for any judgment or order reversing, setting aside, or in any manner affecting any of the proceedings of the mayor of the city of New York, in or upon or toward the removal of said Sidney P. Nichols from the office of commissioner of police of the police department of the city of New York, upon or in pursuance of the writ of *certiorari* heretofore issued out of this court to said mayor, and the return thereto, or either of them, and prohibiting and restraining the said Sidney P. Nichols from moving at or applying to any such Special Term, at chambers, for any such judgment or order of reversal, or of any other judgment or order upon said writ and *certiorari*, or either of them.

[L. S.]

HUBERT O. THOMPSON, *Clerk*.

(The absolute writ follows form of alternative writ, except as to terms of final order, to be embodied in it instead of order to show cause.)

Precedent for Form of Order Denying Writ.

At a Special Term of the Supreme Court, held at the chambers of
Hon. Joseph Potter, in Whitehall, on the 18th day of April, 1886:
Present — Hon. Joseph Potter, *Justice*.

<p>The People, <i>ex rel.</i> Henry C. Adams, <i>agst.</i> Zerah S. Westbrook, Surrogate, etc., and Jacob C. Nellis, Executor of, etc., of Peter G. Fox, deceased.</p>	}
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The defendants having by their counsel appeared when the writ of prohibition was returnable, and filed their separate return thereto, and the relator having also appeared and moved for and obtained a postponement of the hearing of the matter until this time against the objection of the defendants, and having read and filed, and duly considered the affidavit and papers upon which said writ was granted, and the said returns thereto:

Now, after hearing the arguments of the said Henry C. Adams, the relator in person, in support of the application, and of J. E. Dewey, of counsel for the said defendants, in opposition:

It is ordered and adjudged, that the relator is not entitled to a writ of prohibition absolute, and that his application therefor, and such writ be and the same is hereby denied. And the said surrogate and the said executor are hereby authorized to proceed in the said matter or proceeding pending in or before said Surrogate's Court, and referred to in the alternative writ, the same as if such writ had not been issued.

Also, that the said relator, Henry C. Adams, pay to the defendant,

Jacob C. Nellis, executor, etc., as aforesaid, and the said Zerah S. Westbrook, surrogate, etc., as aforesaid, or to their counsel, J. E. Dewey, Esq., \$50, costs and disbursements of opposing said application.

Also, that the papers upon which said alternative writ was issued, and the said writ, and the said returns thereto, be filed, and this order or adjudication be filed and entered in the office of the clerk of Montgomery county.

JOS. POTTER,

Justice Supreme Court.

§ 2101. A final order, made as prescribed in the last section, can be reviewed only by appeal. Where the order was made by the General Term, the execution of the order appealed from shall not be stayed, except by an order of the same General Term, made upon such terms, as to security or otherwise, as justice requires.

A writ of prohibition not being demandable of right, but resting in sound judicial discretion, an order denying it is not reviewable in the Court of Appeals. *People, ex rel., v. Westbrook*, 89 N. Y. 152.

§ 2102. The proceedings upon a writ of prohibition, granted at a Special Term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged as in an action, by an order made by the judge of the court, but not by any other officer. Where the writ was granted at the General Term, an order staying the proceedings, or enlarging the time to make a return, can be made only by a General Term justice of the judicial department within which the writ is returnable; and where notice has been given of an application for a prohibition at a General Term, or an order has been made to show cause at a General Term, why a prohibition should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.

CHAPTER VI.

THE WRIT OF ASSESSMENT OF DAMAGES.

The provisions of article 6 of title 2 of chapter 16 relate to the assessment of damages of property taken by the State for the use of the people of the State. The article is a re-enactment of a portion of the Revised Statutes (3 R. S. [5th ed.] 501; 2 Edm. 610, 612), materially amended as to the details of the proceedings. The commissioners say that no substantial changes have been made in the scheme of the statute, except as to what is now enacted as section 2111; as to this, the codifiers state that the former statute required the jury on inquisition to find upon several questions upon which there might be conflict of evidence, and very nice points of law might arise; while it provided no adequate machinery for the determination of these questions, and that the amendments contain-

plate the restriction of the jury entirely to the question of value. The fact that this proceeding is always taken by the attorney-general on behalf of the State, that it is exceedingly unusual, and that its details concern only the office of the attorney-general, where precedents are at hand, seem to render it unnecessary to incumber this book with forms which must necessarily be obtained from that office, and which would be of no use to any other practitioner. The same considerations seem to render it superfluous to reprint the sections of the Code on that subject, from 2103 to 2119 inclusive, and hence they are omitted. The single reported case on the subject under the Revised Statutes is *United States v. Dump-lin Island*, 1 Barb. 24, which relates to the practice as it then stood.

CHAPTER VII.

PART I. — THE WRIT OF CERTIORARI.

It is said by a recent text writer that the office of the writ of *certiorari* is to correct errors of a judicial character by inferior courts, and errors in the determination of special tribunals, commissioners, magistrates, and officers exercising judicial powers affecting the property or right of citizens, and who act in a summary way, or in a new way not known to the common law, and also the proceedings of municipal corporations in certain cases. Wood on Mandamus, 194. The writ of *certiorari* has, under the practice, been known as a common-law *certiorari*, and *certiorari* by statute. The former is defined in Bacon's Abridgment, title *Certiorari*, as a writ issuing out of Chancery or the King's Bench, directed to the judges or officers of inferior courts or tribunals, commanding them to return the records of a cause or proceeding depending before them. It also, according to Tidd's Practice, 1138, comprehends the determination of special tribunals, magistrates, officers, and of municipal corporations in certain cases. It brought up the record either for the purpose of examining into the legality of the proceedings, or annulling or quashing an order, or judgment of such inferior court, given in a matter over which the court had no jurisdiction, or for the purpose of giving a defendant sued in such inferior court surer and more certain justice before a higher tribunal. Addison on Torts, 1042.

The statutory writ, as its title implies, issues under a statute authorizing the granting of the remedy, and previous to the Code of Civil Procedure such statutes, to a greater or less extent, prescribed the forms and methods to be followed in laying down the rules governing its operation. The common-law writ had its scope and character clearly defined by a long line of authorities, showing the occasions upon which it would be granted, and a distinct and well-defined practice had grown up with its administration. Most of these rules were followed in practice under the statutory writ, and they have formed the basis for the present regulations found in the Code. It is said in *People v. Van Alstyne*, 32 Barb. 131, that "sometimes the writ is expressly authorized, and its limits defined by statute, and then, of course, the nature and extent of the powers and the cases in which it is to be exercised depend mainly, if not entirely, on the provisions of the statute; sometimes there is no statutory regulation on the subject, and then the writ is denominated a common-law *certiorari*." The common-law writ was much more usual in practice, although there were a number of statutes prior to the Repealing Act. But no statute had defined the general use and character of the writ which is, by the present section, only restricted to the two general classes described as common law and statutory. The practice had, aside from exceptional cases under the statutory writ, never been codified, and was the outcome of common-law procedure, and regulated by the decisions of the courts. Since there is in the present section no attempt to define with more particularity than above stated, the cases in which the writ is allowed to issue, the following quotation is made from the note of the revisers in their report of the article in a form substantially as at present, to the legislature.

"1. A court of general jurisdiction may, in its discretion, upon the application of any party, to or in certain illy defined cases, a person interested in a suit or proceeding before any inferior court, tribunal, board, officer or other person, vested by law with an authority judicial in its nature (*Easton v. Calendar*, 11 Wend. 90; *Matter of Mt. Morris Square*, 2 Hill, 14; *People v. Van Alstyne*, 32 Barb. 131; *People v. Board of Health*, 33 id. 344; S. C., 12 Abb. Pr. 88; *People v. Supervisors of Livingston*, 43 Barb. 232); and, perhaps, also where the power is ministerial in its nature, but necessarily connected with judicial authority (*People v. Hill*, 7 Alb. L. J. 220), issue a writ of *certiorari* to review any final determination, judicial in its nature, made in such proceeding, by such authority (or, under

color thereof, *Fitch v. Kirkland Commissioners*, 22 Wend. 132; *People v. Suffolk Judges*, 24 id. 249); where the applicant cannot be adequately relieved in any other way. *People v. Supervisors of Queens*, 1 Hill, 195; *People v. Board of Health*, 33 Barb. 344; 12 Abb. Pr. 88; *People v. Overseers, etc.*, 44 Barb. 467.

"2. A court of general jurisdiction may, in its discretion, upon the application of any party to a proceeding before it, or of its own motion, issue the writ to procure from any such inferior authority, information which the latter has, and which is necessary or convenient for the purposes of justice in the course of the proceedings in the higher court. 2 R. S. 599, part 3, chap. 9, title 3, § 45 (2 Edm. 621); *Graham v. People*, 6 Lans. 149; *Kanouse v. Martin*, 3 Sandf. 593; *People v. Vancemi*, 7 Abb. Pr. 271; *Sweet v. Overseers of Clinton*, 3 Johns. 23.

"3. The common-law remedy, as thus defined, is not taken away, in the absence of express words to that effect, either by a provision of the statute that the determination of the inferior tribunal is final (*Le Roy v. Mayor, etc.*, 20 Johns. 430; *Ex parte Mayor, etc.*, 23 Wend. 277; *People v. Freeman*, 3 Lans. 148), or by a provision in a statute giving a special writ. *Comstock v. Porter*, 5 Wend. 98; *Kellogg v. Church*, 3 Denio, 228. In the latter case the two remedies are concurrent."

This citation, with the authorities, is, perhaps, in a few words as full and explicit a statement as can be made of the principles regulating the issue of this writ. Previous to the Code of Civil Procedure the common-law writ had been much used to bring up matters for review from inferior courts, which were there provided for by appeal, and the restrictions as to the use of the writ will be found enacted here.

§ 2120. The writ of *certiorari* regulated in this article, except the writ specified in section two thousand one hundred and twenty-four of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only:

1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by a statute.

2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute.

§ 2121. A writ of *certiorari* cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record.

§ 2122. Except as otherwise expressly prescribed by a statute, a writ of *certiorari* cannot be issued in either of the following cases:

1. To review a determination which does not finally determine the rights of the parties with respect to the matter to be reviewed.

2. Where the determination can be adequately reviewed by an appeal to a court, or to some other body or officer.

3. Where the body or officer making the determination is expressly authorized by statute to rehear the matter, upon the relator's application; unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed.

The writ is a discretionary one, and the court has power to grant or withhold it. It cannot be demanded as a matter of right, and it lies in the sound discretion of the court whether to grant or withhold it, and it is the duty of the court to examine the matter and determine whether justice requires its allowance. This is so well settled, and so strictly followed that the Court of Appeals, when a writ is quashed at General Term, refuses to entertain an appeal, holding it is a matter of discretion in the court below, unless the order appealed from states that it was refused for want of power in the court to grant it. *People, ex rel. Mayor, v. McCarthy*, 102 N. Y. 642. It is said in *People, ex rel. Smith, v. Commissioners, etc.*, 3 State Rep. 615; 103 N. Y. 370: "An order which simply quashes a common-law *certiorari* has often been held not appealable to this court, because the issuing of the writ rests in the discretion of the court, and consequently it can, in its discretion, recall or quash the writ without passing on the validity of the proceeding sought to be reviewed." The authorities are numerous and uniform on this point in this State, although a different rule has been held in England, and also in Massachusetts. *People v. Peabody*, 26 id. 437; *People v. Board of Health*, 33 id. 344; *People v. City of Rochester*, 21 id. 656; *Matter of Eightieth Street*, 17 Abb. 324; *People v. Common Council of Utica*, 45 How. 289; *People v. Andrews*, 52 N. Y. 445; *People v. Hill*, 53 id. 547. The court must be satisfied that the writ is necessary to prevent injustice to the applicant, and that it would be beneficial to him and not detrimental to the public welfare. *People v. Mayor*, 5 Barb. 43. Nor will it lie where there is another adequate remedy. The writ is only to be resorted to in case where an appeal or other appropriate and proper remedy is not available, and should not be resorted to unless necessary to obtain a review in cases where no other provision therefor is made by law. *People v. Supervisors of Queens*, 1 Hill, 195; *People v. Covert*, id. 674; *People v. Morgan*, 65 Barb. 473; *People v. Overseers of Berne*, 44 id. 467; *People v. Board of Health*, 33 id. 344. The writ lies only to review acts judicial in their nature, and will not be granted to review mere ministerial acts. *People v.*

Mayor, 5 Barb. 43; *People v. Hill*, 65 id. 170; *People v. Vunslyck*, 4 Cow. 297; *Pugsley v. Anderson*, 3 Wend. 468; *People v. Mayor*, 2 Hill, 9; *Matter of Mount Morris Square*, id. 14. And in such cases where there was a judicial discretion to be exercised by the inferior tribunal, the writ should be refused. *Lawton v. Commissioners of Cambridge*, 2 Caines, 179. The present Code does not authorize the review or modification of the determination of inferior jurisdictions in matters within that jurisdiction which are confided to their discretion. *People, ex rel., v. First Commissioners*, 100 N. Y. 82. It corrects errors of a judicial not of a ministerial nature, even though the body exceeds its powers, and the same is true as to legislative acts. *People v. Board of Health*, 33 Barb. 344. Where *certiorari* is the only relief, and justice cannot be done without having the return of a ministerial officer in the same matter before the court, he should be compelled to make a return. *People v. Hill*, 65 Barb. 170. But the writ will not issue to a purely ministerial officer to review his action. *People v. Waller*, 68 N. Y. 403. Nor does it lie to a ministerial officer to examine process under which he acts or his title to office. *People v. Supervisors of Queens*, 1 Hill, 195. The writ has been refused to review the proceedings of persons who are not officers, though they have assumed to act as such. If they are officers *de facto* their acts are valid. If they are not such, then their acts are void. *People v. Covert*, 1 Hill, 674. Title to office will not be inquired into by the writ. *Coyle v. Sherwood*, 1 Hun, 272. The writ does not lie until after final adjudication by the inferior tribunal. *Lynde v. Noble*, 20 Johns. 80; *Derlin v. Platt*, 11 Abb. 398; *Matter of Hamilton*, 58 How. 290. And in forcible entry and detainer it was refused until after final inquisition found. *Hains v. Wendell*, 4 Wend. 213; *People v. Covill*, 10 Week. Dig. 90. *Certiorari* does not issue to officers or bodies exercising judicial functions till the proceedings below are completed and a final determination had. A tax cannot be reviewed before the assessment-roll is adopted or warrant signed. *People v. Trustees of Palmyra*, 3 Hun. 549.

It was said in an early case in this State, that wherever the rights of an individual are infringed by the acts of persons clothed with authority to act, and who exercise that power illegally and to the injury of an individual, the person injured may have redress by *certiorari*. *Wildy v. Washburn*, 16 Johns. 49. This is now, of course, subject to the qualification that no appeal is allowed by law in such case. It is also said that the writ runs not only to courts,

but to persons invested with authority to decide on the property or rights of citizens, even where, by statute, they are finally to hear and determine if right to the writ is not expressly taken away. *People v. Freeman*, 3 Lans. 148; *Leroy v. The Mayor*, 20 Johns. 429; *Bradhurst v. Turnpike Co.*, 16 id. 8; *Ex parte Mayor of Albany*, 23 Wend. 277. That such a provision in a statute is a bar to the writ, is held in *People v. Betts*, 55 N. Y. 600, a leading case on the subject.

It was also said before the present Code as to the province of the writ, that it was to bring up the record or proceedings of an inferior court or tribunal, to enable the reviewing court to decide whether it had acted within its jurisdiction. This has in some cases been extended to the correction of errors, but it is only allowable where there is no other remedy available, and where it is necessary to prevent injustice. *People v. Betts*, 55 N. Y. 600. Also that the office of the writ extends to the review of all questions of jurisdiction, power and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceeding, that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by express terms of statute law, or by the common law. *People v. Board of Assessors*, 39 N. Y. 81. The writ will not lie to try title to office, and the fact that a public agent exercises judgment and discretion in the performance of his duties does not make his action judicial. *People v. Walter*, 68 N. Y. 403. The writ lies only to a tribunal or officer exercising judicial powers to correct errors of law materially affecting the rights of the parties. *People v. Board of Commissioners*, 97 N. Y. 37. It does not lie to review the order of a board of health declaring a business a nuisance, as it is a legislative act. *People v. Board of Health*, 33 Barb. 344.

To boards or commissioners.—The writ under the former statute ran to assessors to bring up for review their action in assessing property, and numerous decisions were made, and much discussion had as to how far the action of assessors was reviewable by the writ. This question has lost its practical importance since the enactment of chapter 269 of Laws of 1880, providing for the review of the action of assessors, which is given in full hereafter, with the practice as established under it, which follows that under this chapter. Some of the decisions are, however, given, being on the right to review assessments. One of the most important previous to the statute is *Swift v. City of Poughkeepsie*, 37 N. Y. 511. The following are

also on the same point: *Susquehanna Bank v. Supervisors*, 25 N. Y. 312; *People v. Assessors of Albany*, 40 id. 154; *People v. Trustees of Ogdensburgh*, 48 id. 390. The proceedings of commissioners of taxes and assessments, being judicial in their nature, can only be reviewed or questioned in the courts by writ of *certiorari* prosecuted by the party aggrieved, and if parties fail to appear at the proper time and ask the reduction for cause shown, they are subsequently concluded from reviewing the action of the commissioners by *certiorari*. *People v. Wall Street Bank*, 39 Hun, 525. But that question will not be passed upon on appeal if not raised below. *People v. Hicks*, 2 State Rep. 294.

Since the act of 1880 expressly allows evidence to be taken by the court as to the facts on which the assessors have based their judgment, and that statute is now uniformly used on such review, much of the discussion as to the questions to be reviewed is necessarily superseded by the enactment. The writ lies to review acts of boards of supervisors, which are judicial in their nature; also to review and correct items illegally included in a tax levy and warrant. *People v. Supervisors of Westchester*, 57 Barb. 377. It is proper when supervisors reject, as not just and legal, a claim which the legislature has declared to be legal, and has directed them to audit and allow. *People v. Supervisors*, 51 N. Y. 442. It was granted in *People, ex rel. Burhans, v. Supervisors of Ulster*, 32 Hun, 607, to review the action of a board of supervisors in fixing the amount of costs on an equalization appeal on behalf of respondents under the statute. But in passing resolutions to raise money supervisors do not act judicially, and *certiorari* does not lie. *People v. Supervisors*, 43 Barb. 332. It was granted to canal appraisers, where they appraised damages without notice to the owner, and without giving him an opportunity to be heard or produce witnesses. *Fonda v. Canal Appraisers*, 1 Wend. 288. See *People v. Dennison*, 28 Hun, 328. The proceedings of a board of justices of the peace of a town have been reviewed by *certiorari*. *Wildy v. Washburn*, 16 Johns. 49. The writ was allowed against the comptroller to review his decision on hearing of an appeal from equalization by a board of supervisors. *People v. Hillhouse*, 1 Lans. 87. Relator, as owner of lands which had been sold for taxes, petitioned the comptroller to cancel such sale; that any conveyance made thereunder be set aside, which was denied, and the denial affirmed at General Term. In Court of Appeals, *held*, that relator was not a person aggrieved within the meaning of the Code. *People, ex rel., v. Chapin*, 23

Week. Dig. 410; dismissing appeal from 38 Hun, 272. It has also run to board of commissioners of pilots to review their action in irregularly revoking licenses of pilots. *People v. Commissioners*, 54 Barb. 145. *Certiorari* has been granted to review the determination of the canal board; the fact that the board, after the granting of the writ, rescinded its decision does not affect relator's rights. *People v. Canal Board*, 7 Lans. 220. The writ lies to referees in highway cases as to questions of jurisdiction and regularity. If regular, the decision below on the merits is final. *People v. Van Alstyne*, 32 Barb. 131. The proceedings of the board of metropolitan police in removing a policeman are reviewable by *certiorari*. *People v. Board of Police*, 3 Abb. Dec. 488; *People v. Board of Police*, 26 Barb. 481; *People v. Board of Police*, 43 How. 385. Also, of the fire department of Brooklyn, *Pennie v. City of Brooklyn*, 97 N. Y. 654; *Smith v. Commissioners, etc.*, 3 State Rep. 615.

A proceeding to remove the head of a department under the charter of the city of New York is judicial, and, therefore, subject to review by *certiorari*. *People v. Nichols*, 79 N. Y. 582. The decision of the superintendent of insurance, fixing the compensation of a receiver, cannot be reviewed by *certiorari*. *People v. Fairman*, 17 Week. Dig. 168. The decision of assessors of a town under Town-Bonding Act upon the question whether the required number of tax payers have given their consent to the issuing of bonds to a railroad company may be reviewed by *certiorari*. *People v. Morgan*, 65 Barb. 473. The writ also ran to a county clerk or county judge under the Midland Railroad Bonding Act for the same purpose. *People v. Deyo*, 2 T. & C. 142; *People v. Wagner*, 7 Lans. 467. The writ lies to review the action of the board of health in refusing to register unrecorded births. *Ex parte Lauterjung*, 16 J. & S. 303. The writ lies to review proceedings of a court-martial convicting the relator. *People v. Townsend*, 10 Abb. N. C. 69; *Matter of Brackett*, 27 Hun, 605. But the decision of a court-martial cannot be reviewed on *certiorari* if the court had jurisdiction of the subject-matter, and of the person of the accused, and if there was any evidence in support of the charges and specifications. *People, ex rel., v. Rand*, 41 Hun, 529; 5 State Rep. 31. The writ was held to lie to review an adjudication of contempt though the warrant of commitment had not been issued, the order for the warrant being regarded as a final adjudication. *People v. Donohue*, 22 Hun, 470. The ordinance of a common council directing certain work to be done is final and

reviewable by *certiorari*. *People v. Common Council*, 65 Barb. 9. The writ will not lie to review an unlawful decision of a county board of canvassers by which a party intrudes in office. This is a ministerial and not a judicial act. *People v. Van Slyke*, 4 Cow. 297. Nor to the trustees of a school district to review their proceedings. *Storm v. Odell*, 2 Wend. 287; *Suratoga & W. R. R. Co. v. McCoy*, 5 How. 378. See *Easton v. Callender*, 11 Wend. 90. *Certiorari* to review the action of canal appraisers will not lie pending an appeal to the canal board. *People v. Dennison*, 28 Hun, 328. When the action of a board of supervisors is legislative or ministerial in its character it cannot be reviewed on *certiorari*. *People v. Supervisors*, 25 Hun, 131. The action of a board of excise denying the application to revoke a license on the ground that the licensee had violated the provisions of the statute, is not reviewable by *certiorari* if the board has not exceeded its jurisdiction nor proceeded otherwise than according to law. *People v. Board of Excise*, 24 Hun, 195. Where a board of commissioners had jurisdiction and there was evidence legitimately tending to support its decision, and no rule of law was violated, its determination could not be reviewed on a common-law *certiorari*. *People v. Fire Commissioners*, 82 N. Y. 358. See *Pennie v. City of Brooklyn*, 97 N. Y. 654; *Smith v. Commissioners*, 3 State Rep. 615. The writ does not lie to review the report of the commissioners awarding damages occasioned by changing grade of a village street. The remedy is by appeal from the final order of confirmation. *People v. Cobb*, 14 Abb. N. C. 493. *Certiorari* is the proper remedy to review irregularities in a village election. So held in *Dows v. Village of Irvington*, 66 How. 93. The writ lies to review determination of board of supervisors acting as a board of audit. *People v. Supervisors of Madison*, 51 N. Y. 442. Where a statute fixed the proportion of certain expenses which should be borne by certain villages, and by the county respectively, and the police commissioners of the villages, disregarding the statute, rendered an account of such expenses, which charged the whole amount to the county, which amount defendants were proceeding to levy,—*Held*, that this was a grievance which could be reviewed on the relation of a tax payer, but he was without remedy where it appeared that before argument the tax was levied and in part paid. The writ does not operate *per se* as a stay of proceedings. *People v. Supervisors*, 23 Week. Dig. 568. Also to review summary proceedings instituted by the holder of a tax

title in the city of Brooklyn. *People v. Andrews*, 52 N. Y. 445. Writ will not lie to village to review alleged irregularities in proceedings by which it is claimed to have been incorporated. *People v. Nelliston*, 18 Hun, 175. The writ will lie to officer removing head of a department under New York city charter, as it is a judicial act. *People v. Nichols*, 58 How. 200; *People v. Mayor*, 19 Hun, 441; *People v. Cooper*, 21 id. 517. Previous to the Code of Civil Procedure *certiorari* lay to review summary proceedings before a justice. *People v. Perry*, 16 Hun, 461 (1879). A *certiorari* will not lie to review proceedings for laying out a highway pending an appeal to the county judge. *People v. Wallace*, 2 Hun, 152. See *Buckley v. Drake*, 41 id. 384. Where the writ is directed to a board, as that of public works in the city of New York, it should be to the members by their individual names. *People v. Commissioners*, 97 N. Y. 37.

To municipal corporations.—*Certiorari* lies to review a municipal assessment for a local improvement where there has been an essential departure from the statute in principle of assessment. *Leroy v. Mayor of New York*, 20 Johns. 430; *Starr v. Trustees of Rochester*, 6 Wend. 564; *People v. City of Rochester*, 21 Barb. 656. See *Ex parte Mayor of Albany*, 23 Wend. 277. To vacate an assessment on the ground that the assessors erred in their determination as to what property was benefited, the remedy is by *certiorari* not by suit in equity. But otherwise if the assessors proceed on a wrong rule of law. *Kennedy v. City of Troy*, 19 Alb. L. J. 498; 77 N. Y. 443. *Certiorari* is the proper remedy to review the proceedings of municipal bodies. *People v. City of Rochester*, 21 Barb. 656; *Heywood v. City of Buffalo*, 14 N. Y. 534; *People v. City of Utica*, 65 Barb. 9. Proceedings for grading and opening street may be reviewed by *certiorari*. *People v. City of Brooklyn*, 8 Hun, 56; *Bouton v. Brooklyn*, 2 Wend. 395. In order, however, to warrant interference with a municipal corporation by *certiorari*, the act must be plainly judicial. A *certiorari* does not lie to review a corporate resolution appropriating money for a public square. *Matter of Mt. Morris Square*, 2 Hill, 14.

It has been granted to review assessment for opening a sewer for paving streets, for grading avenues, for the construction of a bridge. *People v. Mayor of Brooklyn*, 9 Barb. 535; *People v. City of Brooklyn*, 49 id. 136; *People v. City of Rochester*, 21 id. 656; *Bouton v. President, etc.*, 2 Wend. 395; *Leroy v. Mayor*, 20 Johns. 430; *Ex parte Mayor of Albany*, 23 Wend. 277; *People v. City of*

Utica, 65 Barb. 9. It is held in *People v. Board of Assessors*, 2 Hun, 583, that the writ will be granted only to review assessments on special cause shown, and will be superseded if it appears the remedy sought is against justice and convenience. Also, in the *Matter of Eightieth Street*, 17 Abb. 324, that the writ should be refused in case of a local improvement when there is another adequate remedy. It is held in *People v. McDonald*, 4 Hun, 187; affirmed, 69 N. Y. 362, that *certiorari* should not be granted on the application of two or three out of a large number of persons interested in like manner in assessments for local purposes, especially where adequate relief is afforded in proceedings at law, and this is in conformity with the earlier decisions. In the *Matter of Mt. Morris Square*, 2 Hill, 14, that in general the court ought not to allow the writ where assessments of taxes or awards of damages are in question, which affect any considerable number of persons. It is said in that case, that if there be a want of jurisdiction even in the judicial act sought to be reviewed; or, in other words, if there be any excess of legal power by which a person's rights may be injuriously affected, an action lies, and it is much better that he should be put to this remedy than that the whole proceeding should be arrested, and, perhaps, finally reversed for such a cause.

It is further held that the writ will not lie to review the proceedings of any person, officer or body, acting under a naked power conferred by law to take private property for public use; and in this respect it is followed in *People v. Nearing*, 27 N. Y. 306, holding that where property is taken for public use without making compensation to the owner, by reason of the fact that his case was not provided for by the statute directing the assessment of compensation, the remedy is not by *certiorari* to review the commissioners' action but by action for trespass. The writ will not, according to the foregoing authorities, be allowed for the purpose of reviewing official proceedings of a municipality of either a legislative, executive or ministerial character. Nor was it granted to review an assessment after great delay, where the work has been prosecuted and tax partially collected. *Elmendorf v. Mayor*, 25 Wend. 693; *People v. Mayor*, 2 Hill, 9. *Certiorari* will lie to a board of State officers to review their decision apportioning the expenses of board of railroad commissioners, under Laws of 1852, as they act in a *quasi* judicial character. *People v. Chapin*, 42 Hun, 239. As to the present limitation of time within which the writ will be granted, see section 2125. The summary remedy for relief from assessment by petition

was held in *Matter of Mead*, 74 N. Y. 216, to be statutory and independent of any right to relief to which a party might be entitled by a writ of *certiorari*. It was broadly held in *Western R. R. Co. v. Nolan*, 48 N. Y. 513, and in *People v. Supervisors of Westchester*, 57 Barb. 383, that an illegal assessment may be reversed by *certiorari*. But it will not lie to review an assessment after the roll has been delivered to the supervisors and the tax collected. *People v. The Commissioners of Taxes*, 43 Barb. 494; *People v. Reddy*, id. 539; *People v. Fredricks*, 48 id. 173; *People v. Supervisors of Albany*, 23 Week. Dig. 568. A writ of *certiorari* to assessors to compel the correction of an assessment-roll is ineffectual, when such roll has passed from their possession and control to the board of supervisors before the writ was issued, even though it was directed to the board of supervisors as well. *People v. Tompkins*, 40 Hun, 228. A writ of *certiorari* is an appropriate remedy to review the proceedings of a municipal corporation in procuring a local improvement. *Hanley v. New York*, 16 How. 228. And that an injunction is not the proper remedy is held in same case, and *Mace v. Trustees of Newburgh*, 15 How. 161.

Miscellaneous. *Certiorari* lies to review summary proceedings for forcible entry and detainer pending a traverse of the inquiry. *People v. Covill*, 20 Hun, 460. Under the statute relating to sales of land for taxes the comptroller can be applied to to set aside an invalid sale, and his action reversed by *certiorari* or *mandamus*. *Clark v. Davenport*, 95 N. Y. 478. The remedy of a party believing himself aggrieved by a decision of the comptroller denying an application for the cancellation of a sale for taxes is by *certiorari* and not by *mandamus*. *People v. Chapin*, 39 Hun, 230. See *People v. Chapin*, 23 Week. Dig. 410. As to the review of illegal assessment by the writ, see chapter 269, Laws of 1880, subsequently treated.

§ 2123. A writ of *certiorari* can be issued only out of the Supreme Court or a superior city court; except in a case where another court is expressly authorized by statute to issue it.

§ 2124. Any court of record, exercising jurisdiction of an appellate nature, may issue a writ of *certiorari*, requiring the body or officer whose proceedings are under review, to make a return to the court issuing the writ, at a time and place, fixed by the court, and designated in the writ, for the purpose of supplying any diminution, variance, or other defect, in the record or other papers, before the court issuing the writ, in any case where justice requires that the defect should be supplied, and adequate relief cannot be obtained by means of an order.

§ 2125. Subject to the provisions of the next section, a writ of *certiorari* to review a determination must be granted, and served within four calendar months

after the determination to be reviewed becomes final and binding, upon the relator, or the person whom he represents, either in law or in fact.

This provision is new; as theretofore no limit was fixed at common law within which a writ would issue, and the practice had been analogous to the limitations of writs of error. *People v. Mayor*, 2 Hill, 9; *Elmendorf v. Mayor*, 25 Wend. 693. And it was held in *People v. Hill*, 53 N. Y. 547, that unreasonable delay in applying for the writ was ground for refusing it, and for quashing it even after a hearing on the return.

§ 2126. The court, at a General Term thereof, may grant the writ, at any time within twenty months after the expiration of the time limited in the last section, where the relator, or the person whom he represents, was, at the time when the determination to be reviewed became final and binding upon him, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life.

§ 2127. An application for the writ must be made by, or in behalf of, a person aggrieved by the determination to be reviewed, must be founded upon an affidavit, or a verified petition, which may be accompanied by other written proof, and must show a proper case for the issuing of the writ. It can be granted only at a General or Special Term of the court; and the granting or refusal thereof is discretionary with the court.

It must appear that someone is aggrieved, and the extent of their interest. *Ex parte Mayor of Albany*, 23 Wend. 277. A petition to review the illegality of an assessment under chapter 269, Laws of 1880, may be presented by a number of petitioners, and verified by one. It is not necessary each petitioner should sign the petition; it may be signed by an attorney. *People, ex rel., v. Coleman*, 41 Hun, 307. The application for the writ was formerly founded on affidavit. *Fitch v. McDowell*, 7 Cow. 537. Cause must be shown in all cases where *certiorari* is brought to review the proceedings of an inferior tribunal for error. It is never granted, of course, except when sued out by the people. *Munn v. Baker*, 6 Cow. 396. Before allowing or acting upon the writ the court should be satisfied that it is essential to prevent some substantial injury to the applicant, and that the object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice. *People v. Mayor*, 5 Barb. 43; *Conover v. Derlin*, 24 Barb. 641. When granted upon mere suggestion without affidavit, the writ was quashed on application of defendant. *Bogert v. Mayor of New York*, 7 Cow. 158; *Comstock v. Porter*, 5 Wend. 98. A *certiorari* to review the acts and decisions of special jurisdictions created by statute, and not proceeding according to the course of

the common law, is not a matter of right, but will only be granted on cause shown. *People v. Supervisors of Allegany*, 15 Wend. 193. An order allowing the writ will not be reversed, except in case of a palpable abuse of discretion. *People v. Cooper*, 9 Week. Dig. 229. It is within the discretion of the Supreme Court to grant or withhold the writ, even if the relator has no other remedy, and the decision cannot be reviewed in Court of Appeals. *People v. McCarthy*, 102 N. Y. 630. The writ can only be granted at a General or Special Term of the court, but when the order granting the writ shows by the caption that the writ was regularly granted at Special Term, at a time and place when a term for hearing *ex parte* motions might have been held, and that it was allowed by one of the justices of the court, this should be held conclusive on a motion to quash. *People, ex rel. Burhans, v. Supervisors of Ulster*, 19 Week. Dig. 208. The affidavit should not be entitled. *Haight v. Turner*, 2 Johns. 371; *Whitney v. Warner*, 2 Cow. 499.

Precedent for Petition for Writ.

To the Supreme Court of the State of New York :

The petition of Louis Bevier, supervisor of the town of Marbletown, in the county of Ulster, respectfully shows to the court:

That heretofore an appeal was taken by said Louis Bevier on behalf of said town of Marbletown, from the decision of the board of supervisors of Ulster county, in the equalization of assessments and the correction of the assessment-roll for the year 1885, and such proceedings were taken thereon, that a trial and hearing were had therein by and before the State assessors of the State of New York, James L. Williams, S. N. Wood and John D. Ellis, Esqs., and after said hearing and trial, said appeal was by the State assessors dismissed.

That a considerable amount of evidence, including a large number of exhibits, was taken on said hearing, and that it appeared, by the proof then given, that the said town of Marbletown was entitled to have a large deduction made from its valuation, as corrected by the said board of supervisors, and the amount so deducted placed upon certain towns or city, and that the failure of the said State assessors to so direct and decide, causes great injustice to be done to said town of Marbletown.

That this petitioner is advised that the determination of said State assessors can be reviewed by a writ of *certiorari*, and relief granted to the said town of Marbletown.

That no previous application for a writ of *certiorari* has been made in this matter.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued and allowed by this honorable court, directed to the said State assessors, James L. Williams, S. N. Wood and John D. Ellis, commanding them to certify and return to this court, all and singular,

the proceedings, decisions and actions of the said State assessors, had and made in the premises, together with the record of the proceedings had before them on the said hearing and trial in this matter, including the evidence (except that in their discretion they may return the substance of the exhibits) and printed arguments submitted to them, to the end that said decision and action of said State assessors may be reviewed and corrected on the merits by this honorable court, and that the aforesaid errors of the said State assessors may be corrected, and that the proceedings had by said State assessors may be so revised, modified or corrected, so as to direct what amount ought to be deducted from the corrected valuation of said town of Marbletown, as made by said board of supervisors, and to what town, city or ward the same should be added, and that your petitioner may have such other or further relief as to the court may seem just, and that all the proceedings on account of or by reason of such decisions, by any person, party, body or board, be stayed until the hearing and determination upon this writ.

LOUIS BEVIER,
Supervisor.

Add verification.

§ 2128. Until provision is made in the general rules of practice for requiring, or dispensing with notice of the application for the writ, the court to which the application for writ is made, may, in its discretion, require or dispense with notice. A notice, when it is necessary, must be served with copies of the papers upon which the application is to be made, upon the body or officer, whose determination is to be reviewed, or upon such other person as the court directs, as prescribed in this article for the service of a writ of *certiorari*. The service must be made at least eight days before the application, unless the court, by an order to show cause, prescribes a shorter time. Where notice is given, the person served may produce affidavits or other written proofs, upon the merits, in opposition to the application.

The usual practice is not to require notice of granting of the writ; this is, however, entirely in the discretion of the court, but notice will only be required in case of doubt as to the law or practice governing the particular case, and in such case, where it is desirable to bring all the facts before the court to aid it in the exercise of discretion as to the granting of the writ, affidavits might be read by the opposing party. This was so before the codification. *People v. Supervisors of Queens*, 1 Hill, 195; *People v. Judges of Columbia*, 2 id. 398; *Saratoga & W. R. R. Co v. McCoy*, 5 How. 378. It is held that it is not generally necessary that notice of application for a *certiorari* should be given. *Matter of Bruni*, 1 Barb. 196; *Matter of Woodbine St.*, 17 Abb. 112; *Garner v. Commissioners*, 10 How. 181. An order to show cause is the usual form of notice, and, it has been held, should always be obtained when the writ is desired to review municipal assessments. *People v. City of Rochester*, 21 Barb. 656; *Albany Water-Works Co. v. Mayor's Court*, 12 Wend. 292; *Ex parte Mayor of Albany*, 23 id. 277. The practice is to dispense with notice under the statute of 1880. *People, ex rel. U. & D. R. R. Co v. Smith*, 24 Hun 66; 85 N. Y. 628.

Precedent for Order to show Cause why Writ should not be Granted.
SUPREME COURT.

In the Matter of the Application of
 Louis Bevier, Supervisor of the Town
 of Marbletown, for a Writ of *Certio-*
rari.

On reading and filing the verified petition of Louis Bevier, praying for a writ of *certiorari* to review the decision of the board of State assessors on an appeal from the equalization made by the supervisors of the county of Ulster, and showing that said town is aggrieved, and that proper grounds exist for the granting of an order to show cause:

Now, on motion of Alvah S. Newcomb, attorney for relator, let the board of State assessors (naming them) show cause at a Special Term of this court, to be held at the court-house in the city of Hudson, on the 18th day of May, 1887, at the opening of the court on that day, why a writ of *certiorari* should not be granted to bring up the proceedings of the said board on the hearing of the appeal by the said town of Marbletown, from the equalization made by the board of supervisors of the county of Ulster. Let service be made on or before May 6.

SAMUEL EDWARDS,

Dated May 5, 1887.

Justice Supreme Court.

§ 2129. The writ must be directed to the body or officer, whose determination is to be reviewed; or to any other person having the custody of the record or other papers to be certified; or to both, if necessary. Where it is brought to review the determination of a board or body, other than a court, if an action would lie against the board or body, in its associate or official name, it must be directed to the board or body by that name, otherwise it must be directed to the members thereof, by their names.

The writ must be directed to all persons whose return is necessary to enable the court to determine the regularity or validity of proceedings of the officer or tribunal sought to be reviewed. Each officer, body or board can make return as to his part of the matters done. But this is confined to cases where several officers or boards are required to perform separate acts which make up one official transaction, as assessors, commissioners and county judge, on proceedings for bonding towns. *People v. Hill*, 65 Barb. 170. But on the other hand, where the acts of single officers do not go to make parts of and complete a single transaction, and constitute one entire official act, separate writs must issue to each body or officer whose acts contribute to the completion of the act complained of. *Matter of Woodhine Street*, 17 Abb. 112. *Certiorari* must run to a board of village trustees, and not to the corporation as such, where the action of the trustees is sought to be reviewed. *People v. Trustees*, 1 Hun, 593. It was formerly held that a *certiorari* to a board of police would not run to the individual, but to the board as a body.

People v. Chokwell, 6 Abb. 151. The writ should run to individual overseers of the poor, and not to them in their official capacity. *Overseers of Greenville v. Bishop*, 2 How. 195. And to correct errors of a board of assessors or revision, *certiorari* must run to the board and not to the corporation. *People v. Mayor*, cited in Bliss' Annotated Code under section 2129. Where the writ was against a mere department of the city government, it must be directed to the members of such board by their individual names; so held as to the commissioner of public parks on ground it is not a corporation, and action is not authorized against it in its official capacity. *People v. Commissioners*, 97 N. Y. 37. To review an order of commissioners of highways, directing the removal of an encroachment, it must be directed to the commissioners. *People v. Commissioners of Highways*, 30 N. Y. 72. But *certiorari* directed to different officers having no joint or common duties, but acting independently is bad. *People v. Walter*, 68 N. Y. 403. A writ to review the proceedings of a judge out of court should be directed to the judge, and not to the court of which he is a member. *People v. Kelly*, 35 Barb. 444. The writ will properly issue to a judge to review proceedings on town bonding, even after the proceedings have been completed and the record filed with the county clerk. *People v. Smith*, 45 N. Y. 772; distinguishing *People v. Commissioners of East Hampton*, 30 id. 72. It is held in *People v. Hill*, 65 Barb. 170, that although ministerial acts enter into and form part of the act complained of, the writ is properly directed to the officer or body so acting, but that the writ does not issue to review purely ministerial acts. The writ may be directed to one whose term of office has expired. *Harris v. Whitney*, 6 How. 175; *People v. Hill*, 65 Barb. 170; *Conover v. Devlin*, 15 How. 470.

It is said in 1 Crary's Special Proceedings, 160, on the authority of Bacon's Abridgment, that when the officer who performed the act was dead, the writ runs to his executor. A *certiorari* to remove the proceedings of three justices, affecting a town officer, must be in the name of the people. *Wildy v. Washburn*, 16 Johns. 49. A *certiorari* will lie in the name of the people on the relation of an individual tax payer to review an erroneous assessment. *People v. Supervisors of Westchester*, 57 Barb. 377. A party who has no interest in the subject-matter is not entitled to the writ. *Colden v. Botts*, 12 Wend. 234; *People v. Overseers of Berne*, 44 Barb. 467; *Starkweather v. Seeley*, 45 id. 164. When the the relator attempted to review the proceedings of highway commissioners in

laying out a road, by the writ, on the ground that he was an inn-keeper whose business would be injured by the diversion of travel from the road on which his hotel was located, to the highway laid out, and it appeared that he was in no way a party to the proceeding, and did not own property over which the new highway passed, the writ was not sustained. *People v. Schell*, 5 Lans. 352. A petitioner for the issuing of town bonds may sue out the writ to review the proceeding. *People v. Wagner*, 7 Lans. 467. It has been held that the writ should not be allowed at the instance of an individual to review proceedings for levying a tax which affect a considerable number of persons. *Matter of Fifty-first Street*, 3 Abb. 232. A citizen and tax payer cannot intervene by *certiorari* to bring up the proceedings in an action between a county and citizens which has been compromised by the parties. *Supervisors v. Bowen*, 4 Lans. 24. A national bank cannot institute proceedings to review an assessment for a tax to be imposed upon the shares of its stockholders. *Merchants' National Bank v. Coleman*, 41 Hun, 344. The writ lies by a former owner of premises sold for taxes to review summary proceedings under city charter, begun by grantee against former owners and tenant, under a tax deed to recover demised premises. *People v. Andrews*, 52 N. Y. 415. When relator dies and by will gives an executor the rents and profits in lands affected by the proceedings, the latter may continue them. *People v. Robinson*, 29 Barb. 77. The writ must run in the name of the people, and cannot be prosecuted in the name of an individual alone. *Wildy v. Washburn*, 16 Johns. 49; *People v. Judges of Suffolk*, 24 Wend. 249. It should recite the names of the parties aggrieved and set forth the cause of complaint with the proceedings, and the wish of the people to be certified of them, and directing the judge or other officer or tribunal to certify and return the record to the Supreme Court at a specified time named therein as the return day of the writ, so that the court may then and there cause to be done what of right ought to be done, and directed to the tribunal whose proceedings are sought to be reviewed. *People v. Cholwell*, 6 Abb. 151. The writ should be tested, signed and sealed, and an indorsement made upon it signed by the clerk, showing that the writ had issued by order of the court. 2 Burr. Pr. 195; *Mott v. Commissioners of Highways*, 19 Wend. 640.

The order for the writ is the authority for the clerk to sign the indorsement and affix the seal.

Precedent for Order for Writ with Stay.

At a Special Term of the Supreme Court of the State of New York, held at the Supreme Court chambers at the City Hall, in the city of Kingston, county of Ulster, on the 7th day of December, 1886:
Present — Hon. Samuel Edwards, *Justice*.

In the Matter of the Application of
Louis Bevier, Supervisor of the Town
of Marbletown, for a Writ of *Certio-*
rari to the Board of Supervisors of
Ulster County.

On reading and filing the petition of Louis Bevier, of the said town of Marbletown, the above applicant, verified on the 7th day of December, 1886, on motion of A. S. Newcomb, attorney for said applicant, it is

Ordered, that a writ of *certiorari*, as prayed for in the said petition, be issued, directed to the board of supervisors of the county of Ulster.

That said writ be returnable within twenty days after service thereof, at the office of the clerk of the Supreme Court in and for Ulster county, in the city of Kingston, and that said writ be allowed and signed and sealed by the clerk of this court.

The court hereby, in its discretion, dispenses with notice of the application for the writ in this matter.

It is further ordered that the execution of the determination by said board of supervisors to impose, levy and assess upon the taxable property of said town of Marbletown, and collect from said town the sum of \$3,109.81, to apply toward the payment of the alleged costs and expenses of said board of supervisors as respondents in appeals by the said town of Marbletown and the city of Kingston, to the State assessors of the State of New York, from the decision of said board in the equalization and correction of the assessment-rolls of the different towns in said county of Ulster, and the said city of Kingston, in the year 1885, be stayed, and the said board of supervisors is hereby restrained and enjoined from imposing, levying or collecting said sum, or inserting the same in the tax-roll of said town of Marbletown for the purpose aforesaid, and said board of supervisors are further restrained and enjoined from inserting in the tax-roll of said town, or levying or assessing any sum upon the taxable property of said town, for the costs or expenses of the respondent on said appeal, pending this *certiorari*, or until the further order of this court.

That the relator, being a public officer, and the writ issuing on behalf of a municipal corporation, no security is required.

Enter in Ulster county.

SAMUEL EDWARDS,

Justice Supreme Court.

Precedent for Writ.

The People of the State of New York, on the relation of Louis Bevier, Supervisor of the town of Marbletown, to the Board of Supervisors of the County of Ulster :

WHEREAS, We have been informed by the petition of Louis Bevier,

as such supervisor, verified the 7th day of December, 1886, that the said town of Marbletown and the city of Kingston, which is also located in said county of Ulster, did each, in the year 1885, take an appeal to the State assessors of the State of New York, from the decision of the board of supervisors of the county of Ulster, in the equalization and correction of the assessment-rolls of the different towns of said county, and of the said city, for the year 1885, and such proceedings were had in said appeals that the same have been dismissed by the State assessors.

That at the annual session of the board of supervisors of the county of Ulster, for the year 1886, the said board fixed and determined and audited the amount of costs and expenses of said board, as respondent on said appeal, at the sum of \$21,446.99, and further determined to levy and assess such amount as follows : \$18,337.98 on taxable property of said city, and \$3,109.81 upon the taxable property of said town of Marbletown.

That injustice has been done said town of Marbletown in that the whole of said costs and expenses have been assessed on said town and city, and in that said costs and expenses are largely made up of items which are not legal costs or expenses, and which cannot be legally collected by said respondents on said appeal, against or from said town of Marbletown.

That said petition, among other things, prays that a writ of *certiorari* issue out of this court to bring up the proceeding had by and before the said board of supervisors in reference to said costs and expenses, and the audit thereof, and the items composing the same, and the assessment thereof upon said city and town of Marbletown, to the end that the same might be reviewed, and the error so alleged might be corrected, and the said town of Marbletown might be relieved from the payment of any thing more than its proper proportion of said costs and expenses, or from the payment of any portion thereof which is not legal costs and expenses, and for any further or other relief, as may be just and proper.

We being willing to be certified of your proceedings as such board of supervisors in making audit of such costs and expenses, and in assessing the same, and in all things relating thereto, do command you, that within twenty days after the service hereof upon you, you do certify and return to us, at the office of the clerk of the county of Ulster, all and singular your proceedings, decisions and actions in the premises, with the dates thereof, and all and singular the evidence, documents, records, claims, bills or papers before you, or which were submitted to you, concerning the said matter, and all the resolutions, protests, affidavits and papers offered to or filed with you, as such board, in relation thereto, with the rulings or decisions of said board, or its chairman, including the corrected valuation of the real estate as equalized in said city and town of Marbletown for the years 1885 and 1886, and also the amount of personal property assessed in said city and town of Marbletown by said board for said years, and all action in relation thereto sustained by said board, to the end that said decisions and actions of said board may be reviewed and corrected on the merits by this court, and that the aforesaid error of said board may be corrected according to law, and that the said action or determi-

nation, audit or allowance, may be reviewed or corrected according to law, as to the court may seem just.

Witness, Hon. Samuel Edwards, one of the justices of the [L. S.] Supreme Court, at the City Hall, in the city of Kingston, on the 7th day of December, 1886.

A. S. NEWCOMB,
Attorney for Relator.

JACOB D. WURTS,
County Clerk.

A *certiorari* to review the proceedings of tax commissioners should not require the return of records not affecting the particular property of relator. Facts affecting other property, relied on to show disproportionate valuation, should be left to be established by evidence. *People v. Tax Commissioners*, 10 Abb. N. C. 35. It is too late to obtain a writ of *certiorari* against a board of supervisors to review their proceedings in allowing a claim alleged to be illegal, if the warrant for the collection of taxes has been signed, and the money collected. *People v. Supervisors of Rensselaer*, 34 Hun, 266. The writ will not issue to review the determination of canal appraisers by one whose property has been taken. The remedy is by a hearing before the canal board. *People v. Dennison*, 28 Hun, 328.

When the writ will be quashed. A motion to quash a writ of *certiorari* can only be made in the district where the writ is returnable, or in a county adjoining the district. *People v. Cooper*, 57 How. 463.

After having obtained jurisdiction of a *certiorari*, it is discretionary for the Supreme Court to quash the writ or remand the same on cause shown, or to proceed to its disposition, and an order refusing to quash is not appealable to the Court of Appeals. *Jones v. People*, 9 Week. Dig. 254, Ct. of App. Where, after return made, the court is satisfied that the writ was improvidently granted, or that justice and equity or a regard to considerations of public policy require, it will be dismissed without passing on the questions intended to be raised. *People v. Common Council*, 65 Barb. 9. If improper parties are joined or errors assigned not warranted by the record, such part of the proceedings as are illegal may be quashed or corrected, and the rest affirmed if they are independent of each other. *People v. Supervisors*, 57 Barb. 377. A motion to quash can, as a rule, be made only after return. *People v. Cooper*, 57 How. 463; *Clark v. Lawrence*, 1 Cow. 48. But where a notice of motion was to quash and supersede, it was held the writ might be superseded before return. *Saratoga & Wash. R. R. Co. v. McCoy*, 5 How. 378; *Ferguson v. Jones*, 12 Wend. 241. A decision quash-

ing a *certiorari* for errors appearing upon the face of the writ and not upon the merits cannot be reviewed by writ of error. *People v. Mayor*, 1 How. 90. Where the writ appeared to have been granted at Special Term, the contrary will not be allowed to be shown by affidavit on a motion to quash. *People v. Supervisors of Ulster*, 19 Week. Dig. 208. A motion may be made to supersede the writ if it was improperly issued; also if not properly directed or is otherwise bad in law it will be superseded. *Devlin v. Platt*, 20 How. 167; *Ball v. Warren*, 16 id. 379. Or where the writ has been granted to remove or review a proceeding before it is terminated, the writ will be superseded. *People v. Peabody*, 5 Abb. 194; *Comstock v. Porter*, 5 Wend. 98. But the writ cannot be quashed till after return, but it may be then quashed where it was prematurely issued or allowed by an officer having no jurisdiction to allow it, or on the application of a party not in interest, or where improperly allowed for any reason. *People v. Peabody*, 26 Barb. 437; *Devlin v. Platt*, 20 How. 167; *Caledonian Co. v. Trustees*, 7 Wend. 665; *Colden v. Botts*, 12 id. 234; *People v. Stryker*, 24 Barb. 650; *People v. Supervisors*, 15 Wend. 198; *People v. Mayor*, 2 Hill, 14; *Brown v. Wesson*, 1 How. 141; *People v. Overseers*, 44 Barb. 467; *People v. Supervisors*, 57 id. 377; *People v. Delaney*, 49 N. Y. 655; *Starkweather v. Seeley*, 45 Barb. 165; *People v. Schell*, 5 Lans. 352. The court will quash the writ if improperly allowed, even though a hearing has been had on the merits. *People, ex rel., v. Stillwell*, 19 N. Y. 531; *People, ex rel., v. Mayor*, 2 Hill, 9; *People v. Commissioners*, 103 N. Y. 371. Writ will be quashed where issued to require determination of assessors after roll has left their hands. *People v. Assessors*, 40 Hun, 228. In *People v. Supervisors of Rensselaer*, 34 Hun, 266, following *People v. Supervisors of Queens*, 82 N. Y. 275, it was held where a board of supervisors had audited a claim and signed the tax-roll, and then adjourned *sine die*, that the board could not be required to make return to a writ of *certiorari* as to their proceedings, and that the writ should be quashed, as the board had no power over the matter after the roll had been signed and warrant delivered.

The same rule was held in *People v. Common Council*, 38 Hun, 7, it being said that as the writ had gone into the hands of a mere ministerial officer, and out of the control of those officers who had any judicial control or *quasi* judicial control over it, and the defect was not cured by the fact that a return was made, the remedy was by an action for damages, and the writ must be quashed. Where

a board of supervisors had issued its warrant to the collector before the issuing of the writ, *held*, that it was too late and the writ should be quashed. *People v. Supervisors*, 82 N. Y. 275. See *People v. Supervisors of Albany*, 23 Week. Dig. 568; *People v. Tompkins*, 40 Hun, 238. An order quashing a common-law *certiorari* is not appealable to the Court of Appeals. *People v. Commissioners*, 3 State Rep. 615.

§ 2130. A writ of *certiorari* must be served as follows, except where different directions, respecting the mode of service thereof, are given by the court granting it:

1. Where it is directed to a person or persons by name, or by his or their official title or titles, or to a municipal corporation, it must be served upon each officer or other person to whom it is so directed, or upon the corporation, in the same manner as a summons in an action brought in the Supreme Court, except as prescribed in the next two subdivisions of this section.

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court, or the judges thereof, may be made by filing the writ with the clerk.

3. Where it is to be served upon any other board or body, or upon the members thereof, it may be served as prescribed in section two thousand and seventy-one of this act, for service, upon a like board or body, of an alternative writ of *mandamus*.

It is said in *Mott v. Commissioners*, 19 Wend. 640, that a copy of the order allowing the writ should be served with it, or there should be an indorsement that it is allowed, but that error in that respect may be amended. The proper practice, and that universally adopted, is to have the writ indorsed in form given in precedent. The simple and usual custom is to have two or more writs signed by clerk and sealed, one for service, the other as a duplicate original to be retained by the attorney, although this, of course, is not necessary. It was also held in *People v. Perry*, 16 Hun, 461, that a copy of the affidavit on which a writ is granted need not be served on respondent. In this respect, however, the usual practice is to serve a copy of the affidavit, together with a copy of the order granting the writ, and the writ itself, thus giving the respondent copies of all the papers in the matter.

§ 2131. Except as prescribed in this section, a writ of *certiorari* does not stay the execution of the determination to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed. The court, which grants the writ, may, in its discretion, and upon such terms, as to security or otherwise, as justice requires, direct, by a clause in the writ, or by a separate order, that the execution of the determination be stayed, pending the *certiorari*, and until the further direction of the court. A bond, undertaking, or other security, given to procure such a stay, is valid and effectual, according to its terms, in favor of a person beneficially interested in upholding the determination to be reviewed, who is admitted

as a party to the special proceeding, as prescribed in section two thousand one hundred and thirty-seven of this act.

Staying of proceedings by separate order was affirmed on appeal in *People, ex rel. Burhans, v. Supervisors*, 19 Week. Dig. 208.

The order to stay proceedings should be contemporaneous with the writ. *People v. Board of Aldermen*, 10 Abb. N. C. 33. The writ does not operate *per se* as a stay. *People v. Supervisors of Albany*, 23 Week. Dig. 568.

Precedent for Order.

At a Special Term of the Supreme Court, held at the City Hall, etc.,
December 1, 1886:

Present — Hon. Samuel Edwards, *Justice*.

SUPREME COURT.

The People of the State of New York,
ex rel. Louis Bevier,
agst.

James L. Williams, S. N. Wood and
John D. Ellis, State Assessors of the
State of New York.

On reading and filing the petition of Louis Bevier, the applicant for a writ of *certiorari* to the above-named defendants, verified December 1, 1883, and on granting an order for said writ, it is ordered that the board of supervisors of the county of Ulster be stayed from inserting in the tax-roll and levying on the town of Marbletown any sum for costs and expenses incurred on the appeal from the equalization made by the said board in 1885, taken by said town of Marbletown until the determination of the proceeding granted and allowed, as hereinbefore set forth, or from in any wise enforcing the collection of such sum, or any part thereof, or any of the expenses of said appeal which have been taxed at \$4,250, until such hearing and determination on said writ. This order is on condition that the relator herein bring on this cause for hearing at the next General Term of this court, to be held at the city of Albany on the 25th day of January next, unless the hearing shall be postponed by the court.

Enter in Ulster county.

SAMUEL EDWARDS,
Justice Supreme Court.

§ 2132. A writ of *certiorari* must be made returnable within twenty days after the service thereof, at the office of the clerk of the court. If it was issued from the Supreme Court, it must be made returnable at the office of the clerk of the county designated therein, wherein the determination to be reviewed was made; and if the county, designated in the writ, is not the proper county, the court, upon motion, may amend the writ accordingly. Thereupon all papers on file must be transferred to the clerk of the county, where the writ is made returnable by the amendment.

§ 2133. After a writ of *certiorari* has been issued, the time to make a return thereto may be enlarged, or any other order may be made, or proceeding taken, in

the cause, in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action brought in the same court, and triable in the county where the writ is returnable.

§ 2134. The clerk with whom a writ of *certiorari* is filed, and each person, upon whom a writ of *certiorari* is served, as prescribed in section two thousand one hundred and thirty of this act, must make and annex to the writ, or to the copy thereof served upon him, a return, with the transcript annexed, and certified by him, of the record or proceedings, and a statement of the other matters, specified in and required by the writ. The return must be filed in the office where the writ is returnable, according to the command thereof.

A return to a writ of *certiorari* need not be under the seal of the court, body or officer making it. *Scott v. Rushman*, 1 Cow. 212. And the return should be made by a majority of the board to whom the writ is directed. *People v. Cholwell*, 6 Abb. 151. And it should be made by the officer to whom it is addressed, even though his term of office has expired. *People v. Peabody*, 6 Abb. 228; *Harris v. Whitney*, 6 How. 175. If the return contains matters inserted by way of explanation or otherwise, besides what is ordered to be returned, such matter is irrelevant and is not to be regarded, and the same is true of matters asserted merely as matters of belief or information, and not as a fact. *People v. Mayor*, 2 Hill, 9; *Leroy v. Mayor*, 20 Johns. 430; *Lawton v. Commissioners*, 2 Cai. 179; *Stone v. Mayor of New York*, 25 Wend. 157.

An officer to whom a writ of *certiorari* is directed is only called upon to make return as to the matter specified in the writ. His return is conclusive as to the facts, and cannot be contradicted; it must be taken as conclusive and acted upon as if true. *People v. Dains*, 38 Hun, 43. The following cases are upon the point as to what is brought up by the writ, and discuss the question as to whether the evidence must be returned. They relate largely to the review of questions of jurisdiction only on common-law *certiorari* before the present Code, and they must now be examined by the practitioner in connection with section 2140, which enumerates the questions which may be now reviewed on *certiorari*, and renders many of the cases heretofore in point, partially or entirely obsolete. It has been thought better to cite the cases bearing on the question than to attempt to decide as to those which conflict with the section, and leave the matter open to examination on the authorities cited, and the provisions of the Code. Even among the cases before the Code much conflict had arisen, as will appear by the following citations: *Rathbun v. Sawyer*, 15 Wend. 451; *People, ex rel., v. Goodwin*, 1 Seld. 568; *People v. Board of Police*, 16 Abb. 337; *People v. Mayor*, 2 Hill, 9; *People v. VanAlstyne*, 32 Barb. 132; *Stone v.*

Mayor, 25 Wend. 168; *People v. Overseers*, 15 Barb. 287; *Starr v. Trustees*, 6 Wend. 564; *Ex parte Mayor of Albany*, 23 id. 280; *Niblo v. Post's Administrators*, 25 id. 280; *Benjamin v. Benjamin*, 1 Seld. 383; *Morewood v. Hollister*, 2 id. 309; *People v. Goodwin*, 5 N. Y. 568; *People v. Knowles*, 47 id. 415. Affidavits and other papers not a part of the proceedings are not properly before the court, only the record can be proceeded on. *Matter of Eightieth Street*, 16 Abb. 169; *People v. Burton*, 65 N. Y. 452. It was, however, settled before the Code that the return should contain so much of the evidence as was necessary to present the question of law on which relator relied. *Baldwin v. City of Buffalo*, 35 N. Y. 375. And that, where the jurisdiction of the inferior court depends on a fact to be proved before itself, the proof of such jurisdictional facts should be returned to enable the higher court to determine whether the fact was established. *People v. Knowles*, 47 N. Y. 415. And the evidence necessary to show a fact essential to jurisdiction would not be assumed. *People v. Soper*, 7 N. Y. 428. The record itself is sent up. It being called a copy in the return does not affect it. *Wolfe v. Horton*, 3 Cai. 86. *Certiorari* brings up the record and the proceedings to and including, but not subsequent to judgment. *Gill v. People*, 3 Hun, 187; affirmed, 60 N. Y. 643. The writ only brings up such proceedings as remain before the body to whom it is directed. *People v. Supervisors*, 15 Wend. 198; *People v. Supervisors*, 1 Hill, 195. A *certiorari* to one officer does not bring up a proceeding had in the same matter before a different officer. *Fitch v. Commissioners*, 22 Wend. 132; *Mott v. Commissioners*, 2 Hill, 472. An officer to whom a writ of *certiorari* has been issued is only required to make return as to the matters specified in the writ. The hearing must be on the writ and return. The papers on which the writ was issued can be considered only in determining the question as to the jurisdiction of the court to issue it, and possibly as establishing as facts such matters as were embraced in the writ and omitted from the return. *People v. Dains*, 38 Hun, 43; *People v. French*, 25 id. 111. The court cannot consider affidavits tending to show that the return is false, nor refer it to a referee to ascertain the truth. Remedy is only by an action for a false return. *People v. Mayor of Syracuse*, 6 Hun, 652; *People v. Ryken*, id. 625. The return to a writ of *certiorari* must be taken as conclusive and acted upon as true; if false in fact the remedy is by an action for a false return. *People v. Fire Commissioners*, 73 N. Y. 437. This rule is modified by statute in case of *certiorari* to review assessments. Chap. 269, Laws 1880.

Form of Return.

SUPREME COURT.

The People of the State of New York,
ex rel. Louis Bevier, Supervisor of
 the town of Marbletown,

agst.

The Board of Supervisors of Ulster
 County.

To the Supreme Court of the State of New York:

The return of the board of supervisors of the county of Ulster, in obedience to the writ of *certiorari* hereto annexed: The board of supervisors certifies and returns, that on the 28th day of November, 1885, the supervisor of the town of Marbletown appealed from the equalization made by the board of supervisors of the county of Ulster at their annual session in said year. That thereupon a committee was appointed by said board to take charge of said appeal, and such committee proceeded to retain counsel and made preparations to defend said appeal. That they caused searches to be made in the Ulster county clerk's office for all sales made within five years last past, and proceeded to identify the several properties and prepare sales lists at an expense of about \$1,000, and denies that such expense exceeded \$2,000. That three appraisers were selected to value the property in each town and make a full and complete list thereof, as also in the town of Marbletown and in the city of Kingston. That on the trial one thousand four hundred and forty-seven pages of evidence were taken, covering the testimony of two hundred and seventy-five witnesses, and statements offered in evidence covering every piece of real estate in the county of Ulster. That the brief, on submitting the case, contained seventy-two printed pages, including nine tables. That the said appeal was dismissed. That the board of supervisors proceeded according to the statute to audit and allow said expenses, and audited them at the sum of \$21,447. That said audit was honestly and fairly made, and hereto are annexed abstracts of the proceedings of said board on said audit and of the bills so audited. We do further certify and return that in the preparation of the matter of the appeals before the State assessors, the trial and the final submission in the proper performance of its duty under the statute, the board of supervisors of Ulster county properly and necessarily incurred the costs and expenses allowed to the parties as aforesaid.

All of which we hereby certify and return as commanded by said writ and directed by statute.

In witness whereof, the undersigned chairman and clerk of the
 [L. s] board of supervisors of Ulster county, have hereunto set their
 hands and the seal of the said county this 2d day of Feb-
 ruary, 1886.

JOHN E. KRAFT, *Clerk.*

C. N. DEWITT,

Chairman.

(Add verification.)

§ 2135. If a return is defective, the court may direct a further return. An omission to make a return, as required by a writ of *certiorari*, or by an order for

a further return, may be punished as a contempt of the court. But a judge or clerk shall not be thus punished unless the relator, before the time when the return is required, pays him, for his return, the sum of two dollars, and in addition ten cents for each folio of the copies of papers required to be returned.

This section is in accord with *People v. Fire Commissioners*, 73 N. Y. 437, holding that, if a return is insufficient, a further return may be compelled. *People v. Dains*, 38 Hun, 43. This is done by motion. This was held in *Overseers of Poor of Brooklyn v. Overseers of Southold*, 2 Cow. 575. If a corporation refuses to make return, a writ of sequestration may issue after *distringas*. *People v. City of Brooklyn*, 5 How. 314. Upon return to a writ of *certiorari*, if the return is false in fact or insufficient in form, the remedy is, in the former case, by action for false return, and in the latter by compelling a further or more specific return. *People v. Campbell*, 50 N.Y. Super. 82.

§ 2136. A writ of *certiorari* may be issued to, and a return to a writ of *certiorari* may be made by, an officer whose term of office has expired. Such an officer may be punished for a failure to make a return to the writ as required thereby, or to make a further return as required by an order for that purpose.

§ 2137. Upon the application of a person specially and beneficially interested in upholding the determination to be reviewed, the court may, in its discretion, admit him as a party defendant in the special proceeding, upon such terms as justice requires. And a General Term of the court at which the cause is noticed for hearing and is placed upon the calendar, may, in a proper case, direct that notice of the pendency of the special proceeding be given to any person in such a manner as it thinks proper; and may suspend the hearing until notice is given accordingly.

§ 2138. The cause must be heard at a General Term of the court. In the Supreme Court it must be heard at a General Term, held within the judicial department, embracing the county where the writ was returnable. Either party may notice it for hearing at any time after the return is complete. Except as prescribed in the next section, it must be heard upon the writ and return, and the papers upon which the writ was granted.

In *People v. Nichols*, 58 How. 200, it was held that the rule requiring eight days' notice is binding only so far as it is consistent with the Code, and that as the Code provided that a notice for hearing a motion for judgment might be made less than eight days, the Code must control, and that an application for judgment so made was regular. Where the relator fails to deny or traverse the sufficiency of a return to a writ of *certiorari*, the facts alleged therein will be taken as conclusive. *People, ex rel., v. Koch*, 2 State Rep. 110; *People v. Fire Commissioners*, 73 N. Y. 439.

§ 2139. If the officer or other person whose duty it is to make a return, dies, absconds, removes from the State or becomes insane, after the writ is issued and before making a return, or after making an insufficient return, and it appears

that there is no other officer or person from whom a sufficient return can be procured by means of a new *certiorari*, the court may, in its discretion, permit affidavits or other written proofs relating to the matters not sufficiently returned to be produced, and may hear the cause accordingly. The court may, also, in its discretion, permit either party to produce affidavits or other written proofs relating to any alleged error of fact, or any other question of fact which is essential to the jurisdiction of the body or officer to make the determination to be reviewed, where the facts in relation thereto are not sufficiently defined in the return, and the court is satisfied that they cannot be made to appear by means of an order for a further return.

§ 2140. The questions involving the merits to be determined by the court upon the hearing, are the following only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

2. Whether the authority conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

3. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated, to the prejudice of the relator.

4. Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof against the existence of any of those facts, that the verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court as against the weight of evidence.

The codifiers as to this section have said: "The questions which the foregoing section aims to settle have been the subject of a great number of adjudications within this State, many of which are obsolete and contradictory." (See 2 Abb. Dig. (new ed.), tit. *Certiorari*, 11-13, art. 118-139.) As late as 1866 it was forcibly said by Morgan, J.: "The decisions of the courts, in relation to the office of a common-law *certiorari*, are so conflicting that it is quite impossible to say that any settled rule has ever been established in this State which has not been subsequently departed from." *Baldwin v. City of Buffalo*, 35 N. Y. 380. Since then these questions have been again before the Court of Appeals in various cases, in the latest of which, *People v. Smith*, 45 N. Y. 772, decided in 1871, Grover, J., lays down the following rule: "Whatever may have been the conflicting authority heretofore, upon the question whether, upon a common-law *certiorari*, the court can inquire into any thing beyond the jurisdiction of the tribunal over the parties and subject-matter, it must now be regarded as settled in this State that it is the duty of the court, in addition thereto, to examine the evidence, and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law

affecting the rights of the parties has been violated." Id. 776, 777. If so much certainty has at last been attained, it seems to be desirable to prevent the possibility of reopening the questions thus decided, and to declare definitely that the cases holding the other way are obsolete by incorporating these principles into the statute. Subdivisions 1 to 4 of the foregoing section embody them correctly, it is believed, the changes of language being such only as appear to be necessary. Subdivision 5 is not in conflict with the ruling in 45 N. Y., but it settles a question which was not considered therein, in general accordance with the opinion of Potter, J., in *People v. Eddy*, 57 Barb. 593, see p. 601."

In connection with these remarks it must also be noted that subsequent to 45 N. Y. 772, the line of decisions up to 1880 ran in a different direction, and in his note to this section Mr. Bliss, in his annotated Code, very justly remarks that the section is new, "but the commissioners considered, when prepared by them, that it made no change in the law, regarding subdivision 5 as consistent with 45 N. Y. 772, and 57 Barb. 593, which were then the latest cases, but it is hardly consistent with 69 N. Y. 408, and some other cases since published." As was remarked with reference to section 2134 as to the contents of the return, the decisions before the Code were not only in direct conflict with the rule established by this section, but are not reconcilable among themselves, as may be said of the cases in 45 N. Y. and 68 id., just cited. The old rule was strongly that the question of jurisdiction only could be determined on *certiorari*. It would seem the courts then adopted a much more liberal view, and allowed the evidence to be looked into somewhat, and questions of law to be considered; then the pendulum swung back and only questions of law, materially affecting the rights of the litigants, could be determined. The first stage arrived at by the courts is the strict adherence to the rule that on a common-law *certiorari* no other questions can be reviewed than those relating to the jurisdiction below, and to the regularity of the proceedings, and this view is held in the earlier cases. *Birdsall v. Phillips*, 17 Wend. 464; *Allyn v. Commissioners*, 19 id. 342; *Miller v. Bush*, 21 id. 651; *People v. New York City*, 2 Hill, 9; *People v. Judge of Columbia*, id. 398; *Haviland v. White*, 7 How. 154. To the same effect is the rule that where the jurisdiction of an inferior court depends on extrinsic facts, the court will examine the evidence to determine the question of jurisdiction, but for no other purpose. Held in *People v. Board of Metropolitan Police*, 24 How. 481, and substantially in *People v.*

Sanders, 3 Hun, 16, also in *People v. Overseers of Ontario*, 15 Barb. 286, that on the return to a common-law *certiorari* the Supreme Court will not consider the weight of evidence, but they will determine whether there was any legal evidence to support the proceedings below. But it was nevertheless held during this period that on a *certiorari* to review summary proceedings against a tenant holding over, the court had power to look into the evidence to see whether it authorized the findings. *Anderson v. Prindle*, 23 Wend. 616; *Niblo v. Post*, 25 id. 280; *Benjamin v. Benjamin*, 5 N. Y. 383; *Morewood v. Hollister*, 6 id. 309; *Brick v. Binninger*, 3 Barb. 391; *People v. Rochester*, 21 id. 656; *Carter v. Newbold*, 7 How. 166. It was also held that the court would look only into the facts returned, on the question of jurisdiction, and could not assume there was other evidence to sustain jurisdiction. *People v. Soper*, 7 N. Y. 428. But that a common-law *certiorari* in a bastardy case did not bring up the evidence. *People v. Duell*, 16 How. 43.

It was subsequently held that where the decision of a public board is made final and conclusive by statute, the court cannot look into the evidence to sustain it in the absence of a jurisdictional fact. *People v. Canal Board*, 7 Lans. 220. It was also held that, on a *certiorari* to review the decision of the canal commissioners, only legal and constitutional questions can be considered. *People v. Carrington*, 2 Lans. 368. As to *certiorari* to review an assessment under the general tax law, it was held (*People v. Fredericks*, 48 Barb. 173) that the only questions before the court were whether the assessors had jurisdiction, and whether they had kept within it. It was also said that, on *certiorari* to review assessment of damages, the court could not reverse the assessment as to the amount of damages, but might as to the principle on which they were assessed. *Baldwin v. Calkins*, 10 Wend. 167. But see *Matter of Mount Morris Square*, 2 Hill, 14. In *People v. Ferris*, 36 N. Y. 218, it was held that, on *certiorari* to commissioners of highways, the Supreme Court could only affirm or reverse the proceeding.

Shortly after, it was said in *People v. Assessors of Brooklyn*, 39 N. Y. 81, that a common-law *certiorari* brought up for review all questions of jurisdiction, power or authority in the inferior tribunal, and all questions of the regularity of the proceedings which seems to mark what appears to be the transition state of the law on this subject. And in *People v. Smith*, 45 N. Y. 772, and *People v. Eddy*, 57 Barb. 593, it was determined that in a town bonding case, on the return to a common-law writ of *certiorari*, the court was not

limited to the inquiry whether jurisdiction of the parties and subject-matter was acquired, but should examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication to be made, and whether, in making it, any rule of law affecting the rights of the petitioner had been violated, and that the court might examine as to whether the inferior tribunal had jurisdiction. Whether the moving party had, on all the facts proved, made out a case, whether the testimony supported the matter charged, but with the qualification that where some evidence is given to support the case, however slight, if judgment be given thereon, where there is evidence upon the merits on both sides, the court will not reverse unless the case is one in which the weight of evidence is very greatly preponderating, or is so strikingly so, as to create the suspicion of injustice arising from prejudice or passion. The same rule is held in *People v. Van Alstyne*, 32 Barb. 131; *People v. Supervisors*, 57 id. 377. And it is held in *People v. Assessors of Albany*, 40 N. Y. 154, that a common-law *certiorari* to assessors brings up the merits as well as the questions of jurisdiction and regularity, and the same general principle is held in *People v. Board of Police*, 39 N. Y. 506; *People v. Commissioners*, 54 Barb. 145. It was determined in *People v. Lawrence*, id. 589, and *People v. Tubbs*, 59 id. 401, that where the writ was given by statute, the authority of the court was not limited, as at common law, to questions of jurisdiction and regularity, but it might look into the merits and examine the evidence, and affirm, reverse or quash the proceedings, as justice may require. It was in view of these decisions, and to conform the practice to the rule as there settled, that the codifiers prepared this section, and these cases probably best interpret its scope and meaning.

However, subsequent to the rendering of these decisions, and in matters arising before the enactment of the Code, a somewhat different rule was held. The case cited by Bliss (*People v. Board of Police*, 69 N. Y. 408) is, perhaps, a typical case of this class, showing the backward swing of the judicial pendulum in holding that only errors of law affecting materially the rights of the parties may be corrected on common-law *certiorari*. The evidence may be examined to determine whether there is any competent proof to justify the adjudications made, but questions of fact on conflicting evidence, or conflicting inferences from facts or matters of judgment or discretion, cannot be reviewed. It was held in *People v. Hair*, 29 Hun, 125, that errors in the admission or rejection of evi-

dence cannot be reviewed by *certiorari*. The same rule has been recently held in *People, ex rel., v. Board of State Assessors*, 22 Week. Dig. 453, as to review of proceedings of board of equalization. *People v. Keator*, 17 Abb. N. C. 369.

To the same general effect is *People v. Steele*, 56 N. Y. 664, holding that it is the office of a common-law *certiorari* to review the determination upon the same evidence, and to examine whether the inferior tribunal has conformed in its proceedings to the express terms of the statute law, and recognized in its determination the principles of the common law; and if there were legal and sufficient evidence to authorize the finding, the decision upon the question of fact will not be disturbed. And in *People v. Police Commissioners*, 6 Hun, 229; *People v. Police Commissioners*, 52 How. 289; *People v. Weigant*, 14 Hun, 546, it is held that, on a common-law *certiorari*, it is the duty of the court to see whether there was any competent proof to sustain the adjudication, and whether, in making it, any rule of law has been violated, but mere matters of detail or of discretion will not be reviewed. It is also determined in *People v. Board of Police*, 72 N. Y. 415, that the court is not confined to the mere question of jurisdiction, but will look into the proceedings, and if the adjudication is unsupported by any evidence, will reverse it. Upon a *certiorari* to review proceedings in insolvency, the appellate court may determine not only the question of jurisdiction, but the regularity of the proceedings below. *People v. Sutherland*, 16 Hun, 192. Since the Code of Civil Procedure, the decisions have been in accordance with the terms of this section, and in conformity with the views expressed in 45 N. Y. *supra*. In *People v. Fire Commissioners*, 30 Hun, 376, it was decided that, under this section, the court might, on *certiorari*, review the weight of evidence; and distinguished *People v. French*, 92 N. Y. 306, which held that this section only applied to cases on the hearing, and not on appeal to the Court of Appeals. The Court of Appeals held the same rule as applicable to appeals to that court in *People v. Commissioners*, 93 N. Y. 97, as follows: "Assuming the rule to be that the facts involved in the determination are satisfactorily supported by the evidence, so that the verdict of a jury finding such facts could not be set aside as against the weight of evidence, we are unable to see how it can be claimed that the decision of the commissioners was not justified."

The scope of a review upon a *certiorari* has been enlarged, and a judgment may be reversed if there is such a preponderance of

proof against the existence of the facts found against the relator as would, had the facts been found by a jury, call for a reversal of the verdict as against the weight of evidence. *People v. Jordan*, 1 Civ. Pro. 328. The Court of Appeals held the rule as to review in that court as in previous cases cited in *People v. Fire Commissioners*, 96 N. Y. 644; citing *People v. Fire Commissioners*, 82 id. 358. The court should not reverse for error in finding of fact by court below unless it was clearly against preponderance of proof, so held under chapter 259, Laws of 1880, and on review of action of State assessors. *People v. Keator*, 17 Abb. N. C. 369; *People v. Williams*, id. 366. A conclusion of fact, if without competent proof to support it or opposed by a decided or strong preponderance of evidence, may be reviewed by the court. A decision adverse to the evidence and the conceded truth was an error subject to judicial review and correction. *People v. Zoll*, 97 N. Y. 203. *People v. Heddon*, 32 Hun, 299, holds that, on *certiorari* to review the decisions of referees appointed to hear an appeal from determination of highway commissioners, a presumption arises that all the preliminary requirements of the statute have been complied with, and that the only proceedings to be reviewed were those connected with the inquiry as to the fitness or unfitness of the road. In case of removal of auditor of accounts by comptroller of New York city it was held that it was not for the court to weigh the evidence so as to substitute its judgment for that of the comptroller. *People v. Grant*, Abb. Dig. 1884, p. 51, § 10. The question of extent of review of proceedings of inferior tribunals by *certiorari* is fully considered in *People v. McCarthy*, 102 N. Y. 630, and is held in accordance with rules laid down in the Court of Appeals under the present Code. The language of the section must, therefore, be interpreted in the light of the decisions since its enactment. Previous decisions will be found convenient for reference in all cases where no change has been made from former practice.

When proceedings below final.—Unless jurisdiction is expressly taken away *certiorari* lies even when the decision is declared final, by the older cases. *Leroy v. Mayor*, 20 Johns. 430; *Bradhurst v. Turnpike*, 16 id. 8; *Ex parte Mayor of Albany*, 23 Wend. 277. But *People v. Betts*, 55 N. Y. 600, held the rule to be that where the statute declares the decision final, *certiorari* will not lie, but it seems to be subject to the qualification laid down in *People v. Freeman*, 3 Lans. 148; *People v. Canal Board*, 7 id. 220; *People v. Dewey*, 1 Hun, 529, that the court may still inquire into the juris-

diction of the inferior tribunal to pass upon the subject-matter, and whether within the jurisdiction the acts performed were within the powers conferred by law.

Grounds of objection.—The objection that a *certiorari* was improperly awarded may be considered on a return and hearing on the merits. Moving for an amended return is not a waiver of motion to quash. *People v. McDonald*, 2 Hun, 70. On *certiorari* in *habeas* proceedings the objection that there was no traverse to the return cannot be taken if evidence was taken and considered without objection. *People v. Carpenter*, 46 Barb. 619. If evidence was admitted without objection its competency cannot be passed upon by *certiorari*. *People v. Sanders*, 3 Hun, 16. Where it appears by the return to the writ that the inferior tribunal was entirely without jurisdiction it is wholly immaterial whether the relator raised the objection below or not. *People v. Robertson*, 26 How. 90. It was said in *Commissioners v. Judges of Putnam*, 7 Wend. 264, that where the contest was solely on the merits objection could not afterward be taken, that one of the judges appealed from had previously passed on the same question.

Assessments for improvements.—A jurisdictional question may be reviewed upon the evidence on the return to the *certiorari*. *Stone v. Mayor*, 25 Wend. 157. On *certiorari* to a municipal corporation to review proceedings on a local improvement the court will review the assessment only as to the principle of apportionment and not as to the amount charged on an individual. *Bouton v. President*, 2 Wend. 395; *Owners of Ground v. Mayor*, 15 id. 374; *Ex parte Mayor of Albany*, 23 id. 277. In reviewing assessments for a sewer the court cannot interfere as to the *quantum* of benefit to be derived by each lot, but may decide as to the persons to be affected on a proper construction of the law. *Leroy v. Mayor*, 20 Johns. 430.

The court will not, on *certiorari*, vacate proceedings for a local improvement for an irregularity which does not go to the entire assessment, where there is a sufficient remedy otherwise for irregularity. *People v. City of Brooklyn*, 14 Abb. (N. S.) 115. Mere irregularities in submitting to the electors questions as to an improvement as authorized by statute, which are executive or ministerial acts, cannot be corrected by *certiorari*. *People v. Trustees of Danville*, 1 Hun, 593. On *certiorari* to a city to review proceedings on assessment of expenses for a bridge, the court will not, as ground for setting aside the assessment, consider the validity of a

contract for building the bridge. *People v. Common Council*, 5 Lans. 142.

Miscellaneous.—*Certiorari* lies to a board of supervisors to review the rejection of a claim declared by the legislature to be a lawful charge against the county, when rejected on the ground that it is not just and legal. The court can reverse the proceeding, and the relator can then *mandamus*, if necessary. *People v. Supervisors of Madison*, 51 N. Y. 442. On *certiorari* to review town-bonding proceedings, the question of eligibility of the commissioners named to issue bonds could not be raised, where the return of the county judge showed them to be proper persons. *People v. Hulbert*, 59 Barb. 446. It is held in *People v. Sheriff*, 29 id. 622, that the Supreme Court cannot review, on *certiorari*, the judgment of a court committing for contempt. The court cannot take notice, on *certiorari*, of any fact outside the record, and where matters do not appear by the record they cannot be reviewed. *People v. Wheeler*, 21 N. Y. 82. In cases where the writ is authorized by statute, the authority of the court is not limited to questions of jurisdiction and regularity. It has power, also, to examine upon the merits every decision of the court or officer upon questions of law, and to look into the evidence and to affirm, reverse or quash the proceedings as justice may require. *People v. Lawrence*, 54 Barb. 589. The decision of board of education of New York city in removing a teacher cannot be reviewed, as the power of the board is discretionary. *People v. Board of Education*, 3 Hun, 177. The proceedings of the board of police are to be reviewed with liberality rather than severe criticism, with a view to sustain, rather than reverse, their decisions. *People v. Board of Commissioners*, 8 Week. Dig. 466. It is said in *People v. Board of Fire Commissioners*, 5 id. 486, that the court can, on *certiorari*, review the whole evidence as to the conviction and removal of a regular clerk in the fire department (see cases cited heretofore), while *People v. Board of Police Commissioners*, 11 Hun, 513, affirmed in the Court of Appeals, 52 How. 289, held that the writ brought up only the questions whether the board had jurisdiction of the relator and of the subject-matter, whether he was regularly tried, and whether legal and sufficient testimony was given sufficient to justify the board in finding him guilty. See *Pennie v. City of Brooklyn*, 97 N. Y. 654; *People v. Commissioners*, 3 State Rep. 615. Justices' judgments can no longer be reviewed by *certiorari*. *People v. Sleight*, 2 Hun, 632. The title to office, of persons acting as police justices in New York city with color of

title, cannot be tried on *certiorari* to review a judgment rendered by them. *Coyle v. Sherwood*, 1 Hun, 272.

§ 2141. The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying the determination reviewed, as to any or all of the parties.

It was held, previous to the enactment of this section, that the Supreme Court could only affirm or reverse the proceedings of the court below on *certiorari*. *Baldwin v. Calkins*, 10 Wend. 167; *People v. City of Brooklyn*, 14 Abb. (N. S.) 115; *People v. Ferris*, 36 N. Y. 218. It was thought by the codifiers that this rule, in many instances, worked injustice, and the foregoing section was prepared for the purpose of extending the power of the court on *certiorari*, so as to correspond to the power vested in the Court of Appeals and the Supreme Court upon appeals from orders in special proceedings as well as in actions. It is further observed that the section is so drawn as to confine the power of modification to the determination appealed from and to the parties before the court. The provisions of the Code of Civil Procedure, § 2141, authorizing the court, upon a hearing on return to a writ of *certiorari*, to make a final order annulling or confirming, wholly or partly, or modifying the determination reviewed, does not authorize the review or modification of the determination of inferior jurisdictions in matters within that jurisdiction which are confided to their discretion.

It is to be read in connection with section 2140, which defines the questions which may be determined on *certiorari*, and simply gives power to correct an erroneous determination instead of reversing it absolutely. Where, therefore, the General Term on *certiorari* modified an order, and there was no question of jurisdiction, procedure or evidence, giving the General Term jurisdiction, *held* error. *People v. Board of Fire Commissioners*, 100 N. Y. 82.

§ 2142. Where the determination reviewed is annulled or modified, the court may order and enforce restitution, in like manner, with like effect, and subject to the same conditions, as where a judgment is reversed upon appeal.

§ 2143. Costs, not exceeding fifty dollars and disbursements, may be awarded by the final order, in favor of or against either party, in the discretion of the court.

No costs were allowed on a writ of *certiorari* at common law. The subject is discussed and reasons given and explained. *People v. Metropolitan Police Board*, 39 N. Y. 506. There was much conflict over this question under the Code of Procedure, and the question seems to have been decided in favor of the allowance of costs as a special proceeding. *People v. Fuller*, 40 How. 35. The decisions under the present statutes have been under the provisions of

chapter 269, Laws of 1880, providing for the review of assessments by *certiorari*, and will be more fully referred to under that head. They are *People v. Keator*, 67 How. 277; *People v. Peterson*, 16 Week. Dig. 70; *People v. Keator*, 36 Hun, 592; *People v. Fonda*, 22 Week. Dig. 477. Where the judgment of a court-martial is brought into the Supreme Court on a writ of *certiorari*, and there reversed, the respondent is personally liable for costs awarded by the final order and may be adjudged guilty of contempt for non-payment. See § 2007; *Matter of Leary*, 30 Hun, 394.

§ 2144. The final order of the court upon the *certiorari* must be entered in the office of the clerk where the writ was returnable. But before it can be enforced, an enrollment thereof must be filed. For that purpose, the clerk must attach together, and file in his office, the papers upon which the cause was heard; a certified copy of the final order; and a certified copy of each order, which in any way involves the merits, or necessarily affects the final order.

Under this and the next section no formal judgment seems necessary, beyond the final order; under the former practice a very elaborate judgment was entered.

If judgment is desired it may be entered in the usual form of judgment or affirmance, or dismissing writ, as the case may be.

Precedent for Order Dismissing Writ.

At a General Term of the Supreme Court of the State of New York, held in and for the third judicial department of said State, at the court-house in the city of Albany, on the 31st day of May, 1884:
Present—Hon. Wm. L. Learned, *Presiding Justice*; Hons. Augustus Bockes and Douglass Boardman, *Associate Justices*.

The People of the State of New York,
on the Relation of Louis Bevier, Su-
pervisor of the Town of Marbletown,
and the Town of Marbletown

agst.

The Board of Supervisors of the County
of Ulster.

This matter, coming on to be heard on the petition, writ of *certiorari* and return thereto, and after hearing J. J. Linson, Esq., counsel for the relators, and E. B. Walker, Esq., counsel for the respondent,

Ordered, that the writ of *certiorari* herein granted and tested on the 7th day of December, 1883, and the proceedings thereon, be and the same hereby is dismissed, with fifty dollars costs and disbursements to the respondent.

JOHN W. WALSH,
Dep. Clerk.

Judgment on Order Dismissing Writ.

(*Title.*)

This matter, coming on to be heard on the petition, writ of *certio-*

rari and return thereto, and after hearing J. J. Linson, Esq., counsel for relators, and E. B. Walker, Esq., counsel for respondents,

It is ordered and adjudged that the writ of *certiorari* herein granted and tested on the 7th day of December, 1883, and all proceedings thereon, be and the same hereby is dismissed.

It is further ordered and adjudged that the board of supervisors of the county of Ulster, the respondent herein, recover of the town of Marbletown and Louis Bevier, supervisor of said town of Marbletown, the sum of fifty dollars costs, and fourteen and 25-100 dollars disbursements, making in all the sum of sixty-four and 25-100 dollars.

MARTIN S. DECKER, *Deputy Clerk*.

§ 2145. The filing of the enrollment in the office of the clerk where the final order is entered, as prescribed in the last section, is a sufficient authority for any proceeding, by or before the body which, or the officer who, made the determination reviewed, which the final order of the court directs or permits. But where the execution of the final order is stayed by an appeal to the Court of Appeals, the proceedings below are stayed in like manner.

Appeals.—An appeal from a decision on a writ of *certiorari* to review assessment, under chapter 269, Laws of 1880, is limited imperatively by that law, and not by the Code of Procedure. *People v. Keator*, 3 N. W. Rep'r, 303; S. C., 3 East. Rep'r, 432.

When the writ is quashed below, under the well-settled practice of the Court of Appeals, the appeal to that court must be dismissed. This is upon the ground that the granting or withholding of the writ is discretionary with the Supreme Court. *People v. Board of Police Commissioners*, 82 N. Y. 506, citing *In re Mount Morris Square*, 2 Hill, 14; *People v. Stilwell*, 19 N. Y. 531; *People v. Hill*, 53 id. 549; *People v. Board of Fire Commissioners*, 77 id. 605, and distinguishing *People v. Board of Assessors*, 39 id. 81, which seems to hold a different rule; *People v. Commissioners, etc.*, 103 N. Y. 370 cases cited in points of attorney-general. *People v. McCarthy*, 102 N. Y. 630. The court say in *People v. Hane-man*, 85 N. Y. 655, we have many times decided that an appeal to this court is not allowed from a decision of the Supreme Court quashing a writ of *certiorari*. If, in this case, judgment had been made affirming the action of the commissioners of taxes, an appeal would lie. There thus appears to be a distinction as to the form of the order of the General Term, and in case an appeal is desired, the order should be one of affirmance of the action of the inferior tribunal and not quashing the writ.

It is again held in *People v. Board of Police Commissioners*, 86 N. Y. 639, that an order quashing a writ of *certiorari* is not reviewable in that court. It is held in *People v. Fire Commissioners*, 82 N. Y. 360, that on a common-law *certiorari* the court will examine

the record, not only for the purpose of seeing whether the subordinate tribunal kept within its jurisdiction, but also to ascertain whether there was any legal proof of facts authorizing the adjudication, and whether any rule of law affecting the relator has been violated (citing *People v. Board of Commissioners*, 69 N. Y. 408); and further, that if the tribunal had jurisdiction, and there was evidence legitimately tending to support its decision, and no rule of law was violated, the adjudication is final and cannot be reviewed upon *certiorari*, because the evidence upon which it proceeded was weak or inconclusive, or because the court issuing the writ would, if the case had originally been presented for its decision, have decided differently upon the facts. The question of what is reviewable in the Court of Appeals, on appeal from a common-law *certiorari*, was fully discussed in *People v. French*, 92 N. Y. 306, and it was held that the court would look into the record only for the purpose of seeing whether the subordinate tribunal has kept within its jurisdiction, based its decision upon some legal proof of the facts authorizing it, and violated no rule of law in its proceedings affecting the right of relator. It is further held that section 2140 does not require such a review as would require the examination of evidence; that the section refers to the court hearing the proceedings on the return of the writ, and must necessarily be confined to the court in which such hearing is had. In *People v. Board of Police Commissioners*, 93 N. Y. 101, it is assumed that the rule is that the facts involved in the determination must be satisfactorily supported by evidence, so that the verdict of a jury finding such fact would not be set aside as against the weight of evidence, yet only error of law can be reviewed in that court, and the evidence examined to see that there is any competent proof to justify the decision made. But where an order is made denying a motion to quash the writ issued in a case not reviewable by *certiorari*, an appeal may be taken to the Court of Appeals, distinguishing *Jones v. People*, 79 N. Y. 45, which holds that where a *certiorari* has been lawfully issued, it is a matter of discretion whether the Supreme Court will quash; but if unlawfully or illegally issued, the appellate court may pass upon, and might, of its own motion, quash the writ. *People v. Board of Commissioners*, 97 N. Y. 37. In *People v. McCarthy*, 102 id. 635, it is held that since section 2127 makes the allowance of the writ of *certiorari* discretionary with the court, an order quashing the writ is not appealable to the Court of Appeals. That if the court in making the order had refrained from exercising its discretion upon

the question presented, and had quashed the writ upon the ground of a want of power to issue it, or had quashed it in a case not authorized by law, the court could properly have reviewed the questions presented by an appeal from such determination (citing 97 N. Y. *supra*): "But in a case where that court has exercised its discretion with respect to the allowance or denial of the writ, and has refused to grant it on the ground that it ought not, under all the circumstances of the case, to have been issued, this court has no jurisdiction to review its determination, and so it has repeatedly held." Citing 19 N. Y. 531; 53 id. 547; 85 id. 655. But in a case where, although the order concluded by directing that the writ be quashed, that conclusion was preceded by an adjudication, that the proceeding brought up by the writ was valid and free from error, and the judgment quashing the writ was not rendered in the exercise of the discretion of the court, and on the grounds that the proceeding ought not to be reviewed by the writ, it presents questions of law reviewable in Court of Appeals. *People v. Commissioners*, 103 N. Y. 370. As the law now stands, under the Code the Supreme Court is at liberty to review the evidence, and to review the decision whenever it would feel justified in setting aside a verdict upon the same evidence as against the weight of evidence. *People v. Board of Fire Commissioners*, 30 Hun, 376. In reviewing the decision of the canal board on *certiorari* from the canal appraisers, the court can only inquire whether these bodies have kept within their jurisdiction; it cannot consider the merits or any alleged irregularities not jurisdictional. *People v. Canal Board*, 29 Hun, 159. And the writ will not issue to review proceedings of the canal board while an appeal is pending. *People v. Dennison*, 28 Hun, 328.

§ 2146. The expression "body or officer," as used in this article, includes every court, tribunal, board, corporation, or other person, or aggregation of persons, whose determination may be reviewed by a writ of *certiorari*; and the word "determination," as used in this article, includes every judgment, order, decision, adjudication, or other act of such a body or officer which is subject to be so reviewed.

§ 2147. Where the right to a writ of *certiorari* is expressly conferred, or the issuing thereof is expressly authorized by a statute passed before, and remaining in force after, this article takes effect, this article does not vary or affect, in any manner, any provision of the former statute, which expressly prescribes a different regulation with respect to any of the proceedings upon the *certiorari* to be issued thereunder.

§ 2148. This article is not applicable to a writ of *certiorari* brought to review a determination made in any criminal matter, except a criminal contempt of court.

The only remaining cases under which a statutory *certiorari*, aside

from chapter 269, Laws of 1880, can be taken, are those exempted from the provisions of the Repealing Act of 1880, and are as follows: The *certiorari* provided for by chapter 288, Laws of 1840, section 16, authorizing the writ to be sued out by the attorney-general, on behalf of the State, to review the decision of the canal appraisers on any legal or constitutional question; the writ as authorized by chapter 925, Laws of 1871, may still be sued out to review proceedings under the Town-Bonding Acts, which is no longer of practical importance under the present statutes on that subject. The writ is also provided for by section 47, article 8, title I, chapter V, Part II, Revised Statutes, relating to trustees for insolvent debtors, and hearing may be removed from the Common Pleas to the Supreme Court, and there the proceedings may be examined and corrected. It was held under this statute, in *People v. Brooks*, 40 How. 165, that the Supreme Court could review the decision of the County Court for error on the facts as well as for want of jurisdiction. In *People v. Daly*, 4 Hun, 641, it was held that though the relator had the right of appeal, that the statute was positive as to relator's right to *certiorari*, and it could not be denied to him. The power of the court under this provision is not limited to the questions of the jurisdiction of the officer, or the regularity of the proceedings, but it may examine and correct any erroneous decision of the officer upon a question of law. *Morewood v. Hollister*, 6 N. Y. 309. The older cases on the review of proceedings in insolvency by *certiorari* are *Anonymous*, 1 Wend. 90; *Learned v. Duval*, 3 Johns. Cas. 141; *Spencer v. Hilton*, 10 Wend. 608. By the charter of the city of New York, chapter 410, Laws of 1882, known as the Consolidation Act, it is provided by section 821, that a *certiorari* to review or correct on the merits the action of the commissioners of taxes and assessments in fixing the valuation of real or personal estate under the two previous sections, shall be allowed by the Supreme Court or any judge thereof, directed to the commissioners, on the petition of the party aggrieved, and by section 1118 of the same act substantially the same provision is re-enacted.

PART II.—THE WRIT OF CERTIORARI TO REVIEW ILLEGAL AND ERRONEOUS ASSESSMENTS.

The act of 1880 entirely revolutionizes the law as to the right to review the action of assessors in levying assessments. As is said in *People v. Smith*, 24 Hun, 67, it is apparent from the title of the act and from the act itself, especially from sections 1 and 4, that it is intended to give relief against certain wrongs which have been long and well known to exist, but which have been heretofore practically remediless, citing as an illustration *Youmans v. Simmons*, 6 Hun, 466. The cases, therefore, on this point decided before the passage of the act must be examined with care in view of the provisions of the act and of the later decisions and will, many of them, be found to be obsolete. They are cited, however, as possibly throwing some light on the practice which had become to a certain extent settled as to what could be reviewed and the manner of review. Thus in *People v. Fredericks*, 48 Barb. 173 ; affirmed, 48 N. Y. 70, it was held that on *certiorari* to review a tax under the general tax law the only questions presented are, whether the assessors had jurisdiction to assess relator, and whether they have kept within their jurisdiction in their proceedings. So it was said in *People v. Trustees of Ogdensburgh*, 48 N. Y. 390, that only an extraordinary case would justify the review on *certiorari* of the determination of assessors as to the value of property assessed. That a departure from the standard of value could not be corrected on *certiorari* to review assessment was held in *People v. Delany*, 49 N. Y. 655. So in *People v. Commissioners of Taxes*, 46 How. 277, it was held that the court would not interfere with the valuation made by the assessors. But it was also the rule that the sufficiency of facts disclosed in an affidavit to obtain a reduction of a tax might be examined on *certiorari*. *People v. Assessors of Albany*, 40 N. Y. 154. And the whole evidence might be examined to see if there was any error. *People v. Supervisors of Westchester*, 57 Barb. 377. Where the assessors on a return to *certiorari* state that they have delivered the assessment-roll duly verified to the supervisor, and that it is not under their control or in their possession, the court has no power to render a judgment that can affect the assessment-roll or correct any errors although it is satisfied there was clear error in the proceedings. The only remedy

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of the person aggrieved is by an action against the county to recover back the amount of the tax improperly levied. *People v. Reddy*, 43 Barb. 539; *People v. Fredericks*, 48 id. 173.

LAWS OF 1880, CHAPTER 269, AS AMENDED BY CHAPTER 842, LAWS OF 1887.

AN ACT to provide for the review and correction of illegal, erroneous or unequal assessments.

SECTION 1. A writ of *certiorari* may be allowed by the Supreme Court, on the petition, duly verified, of any person or corporation assessed and claiming to be aggrieved, to review an assessment of real or personal property, for the purpose of taxation made in any town, ward, village or city of the State, when the petition shall set forth that the assessment is illegal, specifying the grounds of the alleged illegality, or is erroneous by reason of over-valuation, or is unequal, in that the assessment has been made at a higher proportionate valuation than other real or personal property on the same roll, by the same officers; and that the petitioner is, or will be, injured by such alleged illegal, erroneous or unequal assessment. When the alleged illegality, error or inequality affects several persons in the same manner, who are assessed upon the same roll, they may unite in the same petition, and in that case the writ may be allowed, and the proceedings authorized by this act had in behalf of all such petitioners.

§ 2. Such writ shall only be allowed by a justice of the Supreme Court in the judicial district, or at a Special Term of the court in the judicial district in which the assessment complained of was made, and shall be made returnable at a Special Term in said district. The writ shall not be granted unless application therefor shall be made within fifteen days after the completion and delivery of the assessment-roll, and notice thereof given, as provided in this act. A writ of *certiorari*, allowed under this act, shall not stay the proceedings of the assessors or other officers to whom it is directed, or to whom the assessment-roll may be delivered, to be acted upon according to law.

§ 3. The court or justice granting the writ shall prescribe in the writ the time within which a return thereto must be made, which shall not be less than ten days, and may extend such time. The assessors, or other officers making a return to such writ, shall not be required to return the original assessment-roll or other original papers acted on by them, but it shall be sufficient to return certified or sworn copies of the roll or other papers, or of such portions thereof as may be called for by such writ. And the return may concisely set forth such other facts as may be pertinent and material to show the value of the property assessed on the roll and the grounds for the valuation made by the assessing officers, and the return must be verified.

§ 4. If it shall appear by the return to such writ that the assessment complained of is illegal, erroneous or unequal, for any of the reasons alleged in the petition, the court shall have power to order such assessment, if illegal, to be stricken from the roll; or if erroneous or unequal, to order a reassessment of the property of the petitioner, or the correction of such assessment, in whole or in part, in such manner as shall be in accordance with law, or as shall make it conform to the valuations and assessments applied to other real or personal property in the same roll, and secure equality of assessment. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, the court may take evidence, or may appoint a referee to take such evidence as the court may direct, and report the same to the court, and such tes-

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timony shall constitute a part of the proceedings upon which the determination of the court shall be made.

§ 5. A new assessment, or correction of an assessment, made by order of the court, shall have the same force and effect as if it had been so made by the proper assessing officers, within the time originally prescribed by law for making such assessment. Disobedience to a writ or order, in any proceeding under this act, may be punished by the court as for a contempt.

§ 6. Costs shall not be allowed against assessors or other officers, whose proceedings may be reviewed under this act, unless it shall appear to the court that they acted with gross negligence, in bad faith, or with malice. If the writ shall be quashed, or the prayer of the petitioner denied, costs shall be awarded against the petitioner, but the costs shall not, in any case, exceed the costs and disbursements taxable in an action upon the trial of an issue of fact in the Supreme Court.

§ 7. Appeal may be taken by either party from an order, judgment or determination, under this act, as from an order, and shall be heard and determined in like manner. All issues and appeals in any proceedings instituted under this act, shall have preference over all other civil actions and proceedings in all courts.

§ 8. If final judgment shall not be given in time to enable the assessors or other officers to make a new or corrected assessment for the use of the board of supervisors at their annual session, and it shall appear from said judgment that said assessment was illegal, erroneous or unequal, then there shall be audited and allowed to the petitioner, and included in the next year's tax levy of said town, village or city, and paid to the petitioner, the amount, with interest thereon from the date of payment, in excess of what the tax should have been, as determined by such judgment or order of the court. Put in case the amount deducted from such assessment by the judgment or order exceeds the sum of ten thousand dollars, the tax so to be refunded by reason of such corrected assessment, other than the proportion or percentage thereof collected for such town, village or city purposes, shall be levied upon the county at large, and audited by the board of supervisors, and paid to the petitioner. And in such case the board of supervisors of the county shall also audit and levy upon such town, village or city, the proportion or percentage of such excess of tax collected for such town, village or city purposes, and the same shall be collected and paid to the petitioner without other or further audit.

§ 9. All assessment-rolls, when finally completed and verified by the assessors, shall, in towns, on or before the first day of September, and in incorporated villages and cities at the time prescribed by their respective charters or laws applicable to them, be delivered to the town, village or city clerk, or other officer to whom such rolls are or may be required by law to be delivered, and there to remain with such clerk or other officer for a period of fifteen days for public inspection. The assessors, or other officers who complete and verify the assessment-roll, shall, after they have delivered the same to the said town, village or city clerk or other officer, forthwith give public notice, by posting the same in at least three of the most public places in said town, village or city, or by publishing the same in one or more newspapers published therein, that such assessment-roll has been finally completed, the officer to whom the same has been delivered, and the place where the same will be open to public inspection. The fifteen days from which to complete the time within which the application for the writ of *certiorari* can be made under this act, shall be the time when said public notice is first given.

§ 10. This act shall not be construed to repeal or abridge any other right or remedy given to review an assessment by any law applicable to any city or incorporated village or by the charters thereof.

Act of 1880.— The provisions of the act of 1880, chapter 269, in regard to the review and correction of assessments by *certiorari*, confers upon the court the power of review and correction only, when it appears by the return to the writ, or the evidence taken thereunder, that the assessment complained of is illegal, erroneous or unequal. It does not authorize a review where it appears the assessment in question was made in accordance with the statutes then in force, and in the due performance of the duty then obligatory on the assessors. *People v. Commissioners of Taxes*, 91 N. Y. 593. The writ under this chapter must be made returnable at a Special Term in the judicial district in which the assessment was made. *People v. Assessors*, 6 State Rep. 744. In *People v. Pond*, 92 N. Y. 643, an appeal from an order of the General Term which affirmed an order of the Special Term, made in proceedings by *certiorari*, under chapter 269, Laws of 1880, to review and correct an erroneous assessment, was dismissed on the ground that there was sufficient evidence to authorize the Supreme Court to exercise its discretionary power. The act of 1880 giving a remedy by *certiorari* to review and correct an illegal or excessive assessment does not permit a party complaining of an assessment, who has omitted to avail himself of the opportunity provided by statute to remedy his grievance after the assessment has been confirmed by lapse of time, to arrest the collection of the tax by a proceeding under said act. *People v. Commissioners of Taxes*, 99 N. Y. 254. It is held in *People v. Commissioners of Taxes*, *id.* 157, that it is essential to the support of a claim under this statute to reduce or nullify an assessment made by the proper officers, that it should be made to appear affirmatively by sufficient proof that such assessment is in part or as a whole erroneous. Citing *People v. Davenport*, 91 N. Y. 581. If the evidence fails to show this or leaves the matter in doubt it is the province of the assessors to determine the value and amount of the property liable to taxation. For the purposes of an appeal a judgment in proceedings by *certiorari* to review an assessment under the act of 1880 is to be considered as an order, and an appeal to the Court of Appeals must be taken within sixty days, being the time prescribed by law for taking appeals from orders. It is said that it was the intention of the legislature that the proceedings should be brought to a speedy termination, and that they should be so conducted as to reach a decision in

time for the action of the board of supervisors on the rolls for the year. *People v. Keator*, 101 N. Y. 610; *People v. Fonda*, 22 Week. Dig. 477. The act of 1880 does not apply to assessments for local improvements but to a tax imposed upon the whole body of tax payers for some general purpose of taxation. The objection to a writ issued to review a local tax is not waived by a return to it as the defect goes to its very foundation, nor will the fact that a motion to quash the writ has been denied prevent the objection. *People v. Common Council*, 38 Hun, 7.

The writ will not lie under the act of 1880, unless the party applying therefor has first made application, provided by the statute, to the board of assessors for relief. *People v. Wall Street Bank*, 39 Hun, 529; citing *People v. Mutual Union Telegraph Company*, 99 N. Y. 254. But this question must be raised at Special Term. *People v. Hicks*, 2 State Rep. 294. Where the writ was issued to review the determination of assessors after the roll had passed from their possession and control, the writ must be quashed, even though it ran also to the supervisors. *People v. Assessors*, 40 Hun, 228. No notice of the granting of the writ of *certiorari* to review an assessment of real or personal property under the act of 1880 need be given if the court, in its discretion, sees fit to dispense with it. The hearing should be at Special Term, under the provisions of this act, and the supervisor, a necessary party. It must require a return to be made thereto at a Special Term, to be held not less than ten days from the time of its allowance, but it is not necessary that the writ should be served ten days before the return day. A writ issued on the application of one assessed for real estate only may require a return as to both real and personal property. The return to the writ issued thereunder is not conclusive, but is open to contradiction, and the court may appoint a referee to take and report the evidence. *People v. Smith*, 24 Hun, 66; appeal dismissed, 85 N. Y. 628. The provisions of the act of 1881, in reference to the powers of assessors of the city of Albany, does not prevent a review of their action under the act of 1880, in determining the value of real estate used for business purposes, for the purposes of taxation under this act. The cost of creating it may be considered, yet the more controlling consideration is its earning capacity. *People v. Weaver*, 34 Hun, 321; appeal dismissed, 99 N. Y. 659. Same rule is held in *People v. Pond*, 13 Abb. N. C. 1, and also that if the assessment-roll and affidavit are not returned, the court may presume that the affidavit conformed to the statute in respect to the statement of the rule of

valuation; also, the form of denial in return considered. In *People v. Keator*, 36 Hun, 592, it was held that under this act, on review of value of real estate, it is proper to make the test of the value of the property for assessment for the purposes of taxation, to consist in its earning capacity rather than the cost of its construction, not as an absolute test, but as an element, and a safer and more just guide; especially so of a railroad, when the road is of small value as compared with its cost; and in such cases the General Term will not reverse the determination of the Special Term on the question of value, unless the finding is clearly opposed to the preponderance of evidence. See *People v. Hicks*, 2 State Rep. 294.

The strict rules of evidence will not be applied in cases arising under this act, and a decision will not be reversed for improper admission of evidence, unless it can be seen that it influenced the determination.

A petition for the writ under this statute may be presented by a number of petitioners joining together, and verified by one or more; it is not necessary that each petitioner should sign the petition, the signature of an attorney being sufficient, as in case of a complaint in a civil action. *People v. Coleman*, 41 Hun, 307. It is proper in such a case to admit in evidence conveyances of other property, as establishing presumptively the prices for which it sold, and also estimates of value for the purpose of obtaining loans and insurance. Objections made before the referee must be renewed before the court, or they will be deemed waived. An order of reference in proceedings by *certiorari* under act of 1880, to review and correct an alleged illegal, erroneous or unequal assessment, or an order refusing to set aside such an order of reference, is not reviewable in the Court of Appeals; neither order is final nor involves a substantial right under the Code of Procedure, section 190. *People v. Smith*, 85 N. Y. 628. The proceeding under the statute is, by its language, confined to the person or corporation assessed and claiming to be aggrieved. A corporation cannot review under it a tax imposed upon the stockholders, because the tax would be against the persons who were stockholders in the corporation, and they were the only persons who could be aggrieved by the tax. *People v. Coleman*, 2 State Rep. 615. The provisions of the act of 1880 are not affected by the Code. *People v. Low*, 40 Hun, 176.

A *certiorari* to review an assessment by town assessors must be under seal, because the assessment is the determination of an inferior tribunal, within Code, § 2140, but the omission of a seal is amendable. *People v. Assessors of Herkimer*, 6 Civ. Pro. 297, and

in same case it is held that as such assessors are not a board or body within section 2129, the writ must be directed to them by their names, but the defect of addressing them as "Assessors, etc.," is amendable. For purposes of an appeal, a judgment under this act is to be considered as an order, and an appeal to the Court of Appeals must be taken within sixty days. *People v. Keator*, 101 N. Y. 610.

Costs.—Costs must be awarded on denying the petition. The Special Term has no discretion. *People v. Jones*, 6 State Rep. 112. Where the assessors refused to allow a clergyman his exemption, and his affidavit that he is such is clear and uncontradicted, they should be charged with costs of *certiorari* proceedings to review their action. They cannot act upon hearsay or their own preconceived notions, and if they do so they are chargeable either with gross negligence or intentional wrong within chapter 269, Laws of 1880, allowing costs to be charged against them in such case. *People v. Peterson*, 16 Week. Dig. 70. On *certiorari* proceedings to review an assessment under statute of 1880, costs will not be awarded against the assessors unless it is found that they have acted in bad faith in making the assessment. *People v. Keator*, 67 How. 277; on appeal, 36 Hun, 592. The statute (Laws of 1880, chap. 269, § 6) only relieves the assessors from costs upon the hearing at Special Term on return to the *certiorari*. An appeal from the determination there made is a different matter subsequently provided for and directed to be heard and determined in like manner as an appeal from an order. § 7. In such a case costs are to be given or withheld in the discretion of the court. § 3239. *People v. Aston*, 1 State Rep. 37. Where repeated decisions have been made holding certain property exempt from taxation, it is the duty of assessors to leave the property off the roll; if they again include it they may properly be charged with costs, although an appeal was pending from the first decision. *People v. Fonda*, 22 Week. Dig. 477.

PRECEDENTS UNDER CHAPTER 269, LAWS OF 1880.

Petition for Writ.

To the Supreme Court of the State of New York:

The petition of the President, Managers and Company of the Delaware and Hudson Canal Company respectfully shows to the court:

That said company is a corporation duly incorporated under an act entitled "An act to incorporate the President, Managers and Company of the Delaware and Hudson Canal Company," passed April 23, 1823, and of the several acts amendatory thereof and supplemental thereto, and that said company owns and operates a canal between tide-water at Eddyville, in the county of Ulster and State of New

York, and Honesdale in the State of Pennsylvania, a distance of about one hundred and eight miles, and which runs through the town of Marbletown in said county of Ulster, for the distance of about four miles, and owns and occupies fifty-two acres of land for its said canal, appurtenances and telegraph lines in said town, which is the only real estate owned by it in said town, except a small quantity of land of but little value.

Your petitioner further shows that Z. Roosa, Philip A. Ayres and Peter E. Jansen are the assessors of said town of Marbletown.

That said assessors between the first days of May and July, 1882, proceeded to take up the taxable inhabitants and taxable property in said town of Marbletown, and have prepared and completed the assessment-roll for said town, and on or about the 22d day of July, 1882, made and completed one fair copy thereof, and posted the notice required by law that they would meet on the third Tuesday of August, 1882, at a place in said town specified in said notice, to review their assessments, and that the assessment-roll was left with one of their number, specifying the place where the same could be seen in the meantime.

That the following is a true copy of the assessment against your petitioner and upon its real estate owned by it in said town, as the same appeared upon the said assessment-roll prior to the day of the meeting for review.

Under head of names, "The President, Managers and Company of the Delaware and Hudson Canal Company for real estate and appendages and telegraph line." Under head of value real, "\$180,000."

That your petitioner on the third Tuesday of August, 1882, at the time and place mentioned in the notice given by the assessors to review their assessments, applied to the said assessors to reduce the said assessment against your petitioner by its duly authorized agent, and as your petitioner is informed and believes to be true, made oral arguments and statements before the said assessors, that the assessment of your petitioner was much too high, and more than the full value of its said real estate in said town, and offered to be sworn to the statements made and to submit to any examination under oath that the said assessors desired to make, and also offered to allow the said assessors to examine the books of your petitioner, which would show that the gross earnings of said canal, compared with its necessary operating expenses and keeping it in repair, that the said assessment was much more than the value of the petitioner's real estate in said town. That said assessors declined to hear said evidence and examine the books of your petitioner, and relied wholly upon their judgment of the value of said real estate. The said assessors are not, from experience or knowledge, acquainted with the value of canal property, and that their assessment is not more than an official guess at its value.

That said examination, evidence and books would have shown that the assessed value of your petitioner's real estate was unequal, and at a much higher rate than the assessed value of other real estate assessed in said town.

That said assessors refused to reduce said assessments, and in all respects left the same as it had been made by them.

That the said assessors thereafter, and on or about the 31st day of August, 1882, claim to have completed their said assessment-roll, and all of them did severally make and subscribe an oath before a justice

of the peace of said town, which said oath is written on said roll, signed by all of said assessors, and certified by said justice.

That said assessors thereafter delivered the said assessment-roll to Radcliff De Lamater, who is the town clerk of said town. That Louis Bevier is the supervisor of said town. And your petitioner on information and belief, which information it verily believes to be true, further shows that said assessors, on and not before the 1st day of September, 1882, gave a notice, under chapter 269 of the Laws of New York, passed in the year 1880, that said assessment-roll had been completed and left with said Louis Bevier, and that the said assessment-roll would be open for inspection at the office of Radcliff De Lamater, town clerk of said town, for the period of fifteen days.

That said notice has been posted in three places in said town, and were not posted before the 1st day of September, 1882, and that said fifteen days will not expire before the 15th day of September, 1882.

That the assessed valuation of said canal on said tax-roll is largely in excess of what it would be appraised in payment of a just debt due from a solvent debtor.

That the assessment of your petitioner in said town for the year 1881, upon the same property assessed the present year, was \$180,000, and the tax levied and imposed thereon was the sum of \$3,445.33, including the collector's fees, and excluding highway and school taxes.

Your petitioner further shows that the assessment made by the assessors of said town against your petitioner, and at which they finally decided and as it now appears on said assessment-roll, is illegal for the reason that the assessors did not assess the taxable real estate in said town other than that of your petitioner at the full and true value at which it would be appraised in the payment of a just debt due from a solvent debtor, but in fact did assess it at only a fraction of said value, and as your petitioner has been informed and verily believes it to be true, at not over an average of about forty per cent of said value.

That said assessors did not assess all or any considerable part of the taxable personal property owned by taxable inhabitants of said town, and taxable therein, but omitted to put the same upon the said assessment-roll when they had full knowledge, as your petitioner has been informed and verily believes to be true, of said taxable personal property, and the same was liable to taxation in said town, and should be taxed therein; and in cases where taxable inhabitants were taxed for personal property the assessed value thereon was at much less than the full and true value thereof.

And your petitioner further shows, that the said assessment against your petitioner, and upon its real estate in said town, is unequal, in that the assessment has been made at a higher proportionate valuation than other real estate or personal property appearing and assessed on said assessment-roll.

That while the real estate other than that of your petitioner on said assessment-roll is assessed at about an average of forty per cent of its value, that of your petitioner is assessed at more than its full value. That your petitioner claims to be aggrieved by such assessment, and will be injured by such illegal and unequal assessment, and be required to pay a greater amount and proportion of taxes to be levied and collected from the taxable property appearing on said assessment-roll

than it would be required to pay if the said assessment had been made legal and equal, or if made either legal or equal.

Your petitioner further shows that from said assessment-roll, it appears that there are about thirty thousand four hundred and eighty-two acres of land in said town assessed on said roll.

That the total assessed value of the real estate appearing on said roll, as your petitioner is informed and believes, is the sum of about \$827,850, and of which the assessed value upon your petitioner's real estate is the sum of \$180,000, and the number of acres only about fifty-two.

That the total assessed value of the personal property on said assessment-roll is only about the sum of \$12,350:

Wherefore, your petitioner prays that a writ of *certiorari* may be issued and allowed by this honorable court, directed to the said assessors of the said town of Marbletown, commanding them to certify and return to this court, all and singular, their proceedings, decisions and actions in the premises with the dates thereof, together with a copy of the affidavit and certificate of the completion of said assessment-roll, and the notice given by them of such completion respectively, and all and singular the evidence, documents, records and papers before them, or which were submitted to them, concerning the valuation for assessment and taxation of your petitioner's real estate, and of the value of other real estate appearing on said assessment-roll, and also return the number of acres of land assessed and appearing upon said assessment-roll, the total assessed value of the real property assessed on said roll, the total assessed value of the personal property assessed on said roll.

And also to return if the real or personal property, or either, appearing on said roll were assessed at its full and true value at which it would be appraised in the payment of a just debt due from a solvent debtor, or at a percentage of such value, and if so, at what percentage of such value.

To the end that the said decisions and actions of said assessors may be reviewed and corrected on the merits by this honorable court, and that the aforesaid errors of said assessors may be corrected according to law, and that the assessed value of your petitioner's real estate appearing on said assessment be reduced to the proportion and rate of value at which other real estate appearing on said assessment-roll is assessed, or that such other real estate be required to be raised in value equal to the value or proportionate value at which your petitioner's real estate is assessed, so that equality of assessment will be produced, or to order a reassessment to be made, and that the court will either take evidence or cause the same to be taken before a referee to enable your petitioner to show the unequal, unjust and illegal assessment made against your petitioner and upon its said real estate, and for such other and further relief as may be just and the nature of the case require.

And your petitioners will ever pray, etc.

THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY.

[L. s.]

By JAMES C. HARTT, *Treasurer*.

P. & C. F. CANTINE, *Attorneys for Petitioner*.

Office and post-office address, Rondout, Ulster Co., N. Y.

(Add verification.)

Order for Writ.

At a Special Term of the Supreme Court of the State of New York, held at the Supreme Court chambers in the City Hall in the city of Kingston, in the county of Ulster, on the 9th day of September, A. D., 1882:

Present — Hon. Theodoric R. Westbrook, *Justice*.

In the Matter of the Application of the President, Managers and Company of the Delaware and Hudson Canal Company, for writ of *certiorari* to Zachariah Roosa, Philip A. Ayres and Peter E. Jansen, the Assessors of the Town of Marbletown, in the County of Ulster.

On reading and filing the petition of above applicant, verified on the 6th day of September, 1882:

On motion of Peter Cantine, of the firm of P. & C. F. Cantine, one of the attorneys for said applicant, it is ordered that a writ of *certiorari* be issued as prayed for in said petition, directed to the said above-named assessors of the town of Marbletown, in the county of Ulster.

That said writ be returnable at a Special Term of this court, to be held at the Supreme Court chambers, in the City Hall, in the city of Kingston, in the county of Ulster, on the 23d day of September, 1882, at the opening of the court on that day, and that said writ be allowed and signed and sealed by the clerk of this court.

The court hereby in its discretion dispenses with notice of the application for the writ in this matter. T. R. WESTBROOK,
Enter. *Justice Supreme Court.*

Writ of Certiorari.

The People of the State of New York, on the relation of the President, Managers and Company of the Delaware and Hudson Canal Company, to Zachariah Roosa, Philip A. Ayres, Peter E. Jansen, Assessors of the town of Marbletown, defendants, greeting:

WHEREAS, We have been informed by the petition of the President, Managers and Company of the Delaware and Hudson Canal Company, among other things, that said company is a corporation incorporated under an act entitled "An act to incorporate the President, Managers and Company of the Delaware and Hudson Canal Company." passed April 23, 1823, of the Laws of the State of New York, and of the several acts amendatory thereof and supplemental thereto, and that said company owns and operates a canal, which runs through said town of Marbletown, in the county of Ulster, and that the only property of said company in said town is its canal and the telegraph line connected therewith, which has been assessed by said assessors in said town in the year 1882, at the assessed value of \$180,000, except a small quantity of other land of but little value, and that said assessors have refused to reduce the said assessment below the said sum of \$180,000, upon application made therefor by the petitioner, and that said assessment is illegal and unequal, and that the assessment-roll for said town has been completed, signed and verified and delivered to the town clerk of the town of Marbletown, and that notice has been given by said assessors of such delivery, under chapter 269 of the Laws of New

York, passed in the year 1880, and that the same would remain there for the period of fifteen days, and from said petition it appears that fifteen days have not expired since such notice was given, and that said petitioner claims to be aggrieved by such assessment and injured thereby;

We being willing for certain causes to be certified of the proceedings, decisions and actions had by and before said assessors in the matter of assessment for taxation for the year 1882, and of assessment of the lands of said company in said town;

Do hereby command you, the said assessors, that all and singular the said assessment-roll made by you for the year 1882, together with your proceedings, decisions and actions in the premises, with the dates thereof respectively, and all and singular the evidence, documents, records and papers before you, or in your possession, or under your control, touching or concerning the valuation for assessment and taxation of the said real estate of said canal company, in said town, and the assessment thereon, or in anywise in respect thereto; and all and singular the documents, records and papers before you or in your possession, or under your control, touching or concerning the same, and all and singular the evidence, documents and papers, of the value or relating to the value of other real estate or personal property appearing on said assessment-roll, and whether all the personal property liable to taxation in said town has been assessed and appears upon said assessment-roll, together with the number of acres of land appearing and assessed upon the said assessment-roll, and the aggregate assessed value of such real estate, and also the aggregate assessed value of the personal property assessed on said assessment-roll, and whether the said real property was assessed by you at its full and true value at which it would be appraised in the payment of a just debt due from a solvent debtor, and whether the personal property was assessed at its full and true value, or if either were assessed at a less rate of valuation; at what per cent and proportion of such value it was assessed and placed upon said assessment-roll, and the affidavit made by you at the end of said roll, and the certificate thereto by the person taking such affidavit, and also the notice given by you under chapter 269 of the Laws of 1880, you certify and send to our Supreme Court of the State of New York, at a Special Term thereof, to be held at the Supreme Court chambers, in the City Hall in the city of Kingston, in the county of Ulster, on the 23d day of September, 1882, at the opening of the court on that day, together with this writ, to the end that the proceedings, decisions and actions of said assessors in the matter of said assessments and the said assessment of said company's lands in said town, may be reviewed and corrected on the merits by our said court, and that we may further cause to be done thereupon what of right shall be fit to be done.

Witness, the Hon. Theodoric R. Westbrook, one of the justices of said Supreme Court, and of the Third Judicial District
[L. s.] within said State, at the Supreme Court chambers, in the City Hall, in the city of Kingston, in the county of Ulster, on the 9th day of September, A. D. 1882.

(By the Court.)

DANIEL FINGER, *Clerk*.

P. & C. F. CANTINE, *Attorneys for Relator*.

Indorsed—"The within writ allowed this 9th day of September, 1882."

T. R. WESTBROOK, *Justice Supreme Court*.

*Return to Writ.**(Title.)**To the Supreme Court of the State of New York :*

In obedience to the writ of *certiorari* hereto annexed, we, the undersigned assessors of the town of Marbletown, in the county of Ulster, do hereby certify and return :

That between the first day of May and first day of July last past we proceeded to ascertain, and did ascertain and set down, according to our best information, the names of all the taxable inhabitants in said town, and also all the taxable property, real and personal, within the same.

That in the month of July last we sat as a board and prepared the assessment-roll for said town, and set down in four separate columns, according to the best information in our power, the names of all the taxable inhabitants of the town, the quantity of land to be taxed to each person, the full value of such land according to the definition of the term "land" in the statute, the full value of all the taxable personal property owned by each person after deducting the just debts owing by him, and that we also set down in said roll the lands of non-residents, but in a separate part thereof.

That we also set down in the said assessment-roll the lands owned and occupied by the petitioner, the President, Managers and Company of the Delaware and Hudson Canal Company, putting the same in that portion of the roll containing the names of the taxable inhabitants and their property.

That said canal company did not furnish or deliver to us the statement required by law nor any statement relating to said canal or said corporation ; that in making said assessment of its real estate we proceeded and acted upon the best information we could obtain.

That the valuation at which we assessed said corporation was the sum of \$180,000.

That we made and completed a fair copy of said assessment-roll and left the same at the office of the town clerk of said town, and gave the notice required by law, that we should meet on the third Tuesday of August, 1882, at a place in said town specified in said notice, to review our assessments, and that the same was left with the said town clerk, specifying the place where the same could be seen in the meantime, of which the following is a copy : (Here insert copy notice of review.)

That on the said third Tuesday of August, 1882, we met at the time and place in said town specified in said notice, for the purpose of reviewing our said assessment, and that, pursuant to said notice, the said the President, Managers and Company of the Delaware and Hudson Canal Company then and there appeared, by its officers and agents, and claimed a reduction of the amount of its aforesaid assessment on its real estate, but did not file any affidavit or proofs, or offer to give any evidence whatever, nor did the assessors refuse to hear evidence nor offer any inspection of its books, except that its said agent stated that the assessors would be permitted by said corporation to examine certain books and papers at Albany, in the county of Albany, in case they desired to visit that place, which is about sixty miles distant, for that purpose. That said assessors did not avail themselves of the op-

portunity, but are informed and believe said books would have shown the property of said corporation in said town to be of greater value than its assessed valuation, both actually and comparatively.

They further say that the said assessment was not changed by them, and that in making and fixing the same, unaided by a statement of the company for the present year, they were guided by their personal knowledge and experience as residents of said town for many years, and by the information obtained from residents and tax payers of the town, in answer to inquiries made for the purpose of obtaining information as to the actual value of the property assessed by them, using in the main their best judgment in fixing the value of the property; that this is true of all the property assessed by them, save and only so far as they were aided by a statement filed, and affidavit made and filed with the assessors of said town in 1881, and on file in the town clerk's office.

The said statement being a statement from said corporation, giving the costs of the erections or fixtures on the line of the said company's canal at the sum of \$195,912, and of certain other real estate at \$5,794.61, and said affidavit of one of the officers of the corporation fixing the entire costs of the lands, fixtures, excavations, erection and embankments constituting the real estate of said canal company in said town at the sum of \$320,000.

That after the completion of the said assessment, and on the 31st day of August, 1882, they left the said assessment-roll with the supervisor at the office of the town clerk of said town, and on the 1st day of September, 1882, posted the notices required by chapter 269 of Laws of 1880, of the final completion and verification of said roll, and that it had been left at the office of the town clerk, of which the following is a copy: (Insert copy of notice of completion of roll.)

That we have not had the custody or control of said roll since the same was so delivered; a copy of said roll is hereto annexed. They deny that the assessment of the relator's real estate is unequal and at a much higher rate than the assessed value of other real estate situated in the town, and allege that such assessment is fair, equal, and at the same rate as the other property assessed on said roll in the said town.

That the said canal is doing a large and apparently profitable business, as your assessors are informed, as extensive, if not more so, than ever before, and that to all appearances and the best information obtainable from common report, and the high price of the stock of the corporation the property is of great value and highly productive.

That the portion of said canal running through said town for a distance of about four miles is exceptionally valuable by reason of the large number of expensive stone locks, an aqueduct of great strength and solidity, carrying the canal across the Rondout creek, and the extensive rock cuttings required and made; that the corporation also owns an old canal bed of considerable extent used before the rebuilding of said canal, and by reason of these and other matters the said canal property in said town is of much more than average expense and far more valuable than an equal distance of the average of the line.

That the whole taxable property of the town as assessed, aside from the property of said corporation, is the sum of \$660,950.

That this is assessed almost entirely upon farming land and places

of business and private residences in the town; that no railroad or large manufacturing interest is located in said town, and that the land so assessed is not valuable for farming purposes, yielding but a small percentage on its assessed value.

That the whole of the taxable real estate of said town is assessed at the full and true value at which it would be appraised in payment of a just debt due from a solvent debtor, and deny that it is assessed at only forty per cent of said value, as appears more fully by the affidavit annexed to the assessment-roll herewith returned.

That they assessed all the taxable property in said town and taxable therein, both real and personal, known to them, at the full and true value thereof required by law.

That the assessment against the petitioner is not unequal or at a higher proportionate valuation than other real estate or personal property appearing on said roll.

That the petitioner is in nowise aggrieved by the assessment, and will thereby be required to pay only its just and fair proportion of the taxes to be levied from the property appearing on the roll.

That the number of acres assessed in said town in said roll is 30,482.

That the total assessed value of the real estate is about \$828,925, and the value of the personal property assessed is \$12,025.

That we had no other papers or documents before us relating to the real or personal property of said town than what are herewith returned.

Wherefore they ask that the writ of *certiorari* be quashed or dismissed, with costs against the relator.

In testimony whereof we have hereunto set our hands this 29th day of September, 1882.

A. S. NEWCOMB,
Attorney for Defendants.

PETER E. JANSEN,
ZACHARIAH ROSOA,
PHILIP A. AYRES.

(Add verification as to pleading.)

Order of Reference to Take Testimony.

At a Special Term of the Supreme Court of the State of New York, held at the Supreme Court chambers in the City Hall, in the city of Kingston, and county of Ulster, on the 7th day of October, A. D. 1882:

Present — Hon. Theodoric R. Westbrook, *Justice.*

(Title.)

Proof of service having been made of the writ of *certiorari* granted in the above matter on the 9th of September last, returnable on the 23d day of September, together with a copy of the petition on which it was granted, and also of the order directing the writ to issue, and on the return day of said writ the relator having appeared by P. Cantine, of the firm of P. & C. F. Cantine, attorneys and counsel for the relators, and the defendants having appeared by A. S. Newcomb, Esq., the defendants' attorney and counsel, specially for the purpose of making a motion to quash upon certain objections made and filed, and after hearing the respective counsel the said motion was made and denied: Thereupon the said A. S. Newcomb appeared generally

for the defendants, and the matter having been duly adjourned until this day, and the defendants having made and filed their return to said writ;

Now, on motion of P. Cantine on said recited petition, writ, order and return to the writ, and after hearing A. S. Newcomb, Esq., in opposition thereto, and it appearing to the court that testimony is necessary for the proper disposition of the matter:

Ordered, that it be and it hereby is referred to McDonald Van Wagoner, of the city of Kingston, to take and report to this court with all convenient speed, evidence upon the several matters in issue, and particularly if the assessment of the relators' real estate is erroneous, by reason of over-valuation, and also if it is unequal that the assessment of said relators' real estate has been made at a higher proportionate valuation than other real or personal property on the said assessment-roll, a copy whereof forms a part of said return.

And it is further ordered, that the first hearing under this order be had at the court-house, in the city of Kingston, on the 21st day of October, 1882, at two o'clock, P. M., and that the referee shall have power to adjourn from time to time, as justice may require, and that the hearings to take such of the oral evidence as the parties desire shall be held in the town of Marbletown or in any county in the State by consent of parties.

And it is further ordered, that the denial of the motion to quash shall not prevent, and the defendants hereby are granted leave to renew the said motion on the final hearing on the coming in of the referee's report, and that the objections filed on the motion to quash, and in opposition to the order of reference, be taken and considered as part of this order with the same force and effect as if recited at length herein as having been made, overruled, and an exception taken, by and on behalf of the said defendants.

Enter.

T. R. WESTBROOK,
Justice Supreme Court.

Report of Referee.

(Title.)

To the Supreme Court:

I, McDonald Van Wagoner, referee appointed by the court to take evidence in the above-entitled cases, brought to review the assessments of the years 1882 and 1883, do respectfully report that I have been attended by the attorneys of the respective parties, Peter Cantine for the relator, and A. S. Newcomb for the defendants, and have taken all the evidence offered by the respective parties in said cases, and herewith report the same with all other proceedings had before me as such referee.

Dated October 16, 1884.

MCD. VAN WAGONER,
Referee.

Findings by Court on Evidence.

SUPREME COURT — ULSTER COUNTY.

The People of the State of New York
on the relation of the President,
Managers and Company of the Dela-
ware and Hudson Canal Company,
Plaintiff,

agst.

Zachariah Roosa, Philip A. Ayres and
Peter E. Jansen, as Assessors of the
Town of Marbletown in the County
of Ulster, Defendants.

A writ of *certiorari* under chapter 269 of the Laws of 1880, having been granted at a Special Term of the Supreme Court on the 9th day of September, 1882, returnable on the 23d day of September, 1882, to review the assessment of the real estate of the President, Managers and Company of the Delaware and Hudson Canal Company, in the town of Marbletown, for the year 1882, said writ having been duly served, and the defendants having appeared on the return day named in said writ and procured time until October 7, 1882, to make and file their return, and having made and filed their return, and an order of reference having been made to McDonald Van Wagoner, October 7, 1882, to take and report the evidence, and the said referee having taken and reported the evidence, and the proceeding having been brought on to a trial at a Special Term of this court, held at the Supreme Court chambers in the City Hall in the city of Kingston, Ulster county, N. Y., on the 1st day of November, 1884, and after hearing A. S. Newcomb, of counsel for the defendants, and Peter Cantine, of counsel for the plaintiff, and mature deliberation had thereon, the court doth make its decision, and finds the following facts. (Here follow findings of facts.)

I find as conclusions of law :

First. The said assessment of \$180,000 on the relator's real property in said town was erroneous by reason of over-valuation, and was also unequal in that it was made at a higher proportionate valuation than the other real estate on said roll made by said assessors, and that by reason thereof the relator has been required to and has paid the sum of \$2,446.46 in excess of what the tax would have been if its said real estate had not been erroneously and unequally assessed, and had been assessed at the same proportionate valuation that the other real estate was assessed on said roll.

Second. That the plaintiff have judgment, that there be audited and allowed to the President, Managers and Company of the Delaware and Hudson Canal Company, and included in the next annual tax levy of said town and county, the sum of \$2,446.46, with interest thereon from March 1, 1883, and that the same be paid over to said President, Managers and Company of the Delaware and Hudson Canal Company.

Third. No costs are allowed, and judgment is hereby ordered in conformity to this decision.

T. R. WESTBROOK,
Justice of the Supreme Court.

Exceptions to Findings.

(*Title.*)

The defendants herein make and file the following exceptions to the findings herein made by the justice, and filed August 4, 1885.

First. To so much of the first conclusion of law as finds that the assessment of \$180,000 on relator's real property in the town was erroneous by over-valuation.

Second. To so much of said first finding of law as holds that said assessment was also unequal in that it was made at a higher proportionate valuation than the other real estate on said roll made by the assessors.

Third. To so much of the said first conclusion of law as holds that the relator has been required to and has paid the sum of \$2,446.46 in excess of what the tax would have been if its real estate had not been erroneously and unequally assessed, and had been assessed at same proportionate valuation as other real estate on the roll.

Fourth. To the whole of said first conclusion of law.

Fifth. To the second conclusion of law and to the whole thereof.

A. S. NEWCOMB,
Attorney for Defendants.

Judgment.

SUPREME COURT — ULSTER COUNTY.

The People of the State of New York
on the relation of the President,
Managers and Company of the Dela-
ware and Hudson Canal Company,
Plaintiff,

agst.

Zachariah Roosa, Philip A. Ayres and
Peter E. Jansen, as Assessors of the
Town of Marbletown, Defendants.

Judgment, *August 4, 1885.*

This proceeding having been brought on to trial and hearing, and the court having made and filed its decision: Now, on motion of Peter Cantine, of the firm of P. & C. F. Cantine, the plaintiff's attorneys, it is ordered, adjudged and decreed that the President, Managers and Company of the Delaware and Hudson Canal Company — for brevity hereinafter called the relator — during the year 1882, and for many years prior thereto, was the owner of, operated and maintained in good order a canal from tide-water at Eddyville, in the county of Ulster, and State of New York, to Honesdale, in the State of Pennsylvania, a distance of one hundred and eight miles, and which for the distance of four miles runs through the town of Marbletown.

That the total of all the assessments of real property in said town of Marbletown, made by the assessors for the purpose of taxation and appearing on the assessment-roll for the year 1882, was the sum of \$324,800, and the total of all the assessments of personal property on said roll was the sum of \$12,025.

And it is further ordered and adjudged that the said assessors assessed and valued all the real estate on said assessment-roll at .447 per

cent of the true and full value at which it would be appraised in the payment of a just debt due from a solvent debtor, July 1, 1882, except the relator's real estate assessed on said roll, which is of the value hereinafter adjudged. And that the personal property assessed on said roll was assessed at its full value.

And it is further ordered and adjudged that the total amount of taxes levied on all the assessments of real and personal property on said roll was the sum of \$14,677.02, and that the tax levied on said assessment of \$180,000 on the relator's said real estate in said town was the sum of \$3,151.01.

And it is further ordered, adjudged and decreed that the said assessment on the relator's said real estate of \$180,000 should have been \$33,078 to have made it equal, and at the same proportionate valuation that the other real estate on said assessment-roll was assessed.

And it is further ordered, adjudged and decreed that by reason of such over-valuation, as well as by reason of said unequal and higher proportionate valuation, the President, Managers and Company of the Delaware and Hudson Canal Company was compelled to and did pay a tax levied on such assessment of \$3,157.01, which was \$2,446.46 in excess of what the tax would have been if its said real estate had not been assessed erroneously and unequally, and had been assessed at an equal and not at a higher proportionate valuation than the other real estate on said assessment-roll was assessed.

And it is further ordered, adjudged and decreed that there be audited and allowed to the President, Managers and Company of the Delaware and Hudson Canal Company, and included in the next annual tax levy of said town and county, the sum of \$2,446.46, being the excess of what the tax would have been if its real estate had not been assessed erroneously and unequally, and had been assessed at an equal and not a higher proportionate valuation than the other real estate on said assessment-roll was assessed, with interest thereon from the 1st day of March, 1883, the time it was paid, and that the same be paid over to the said President, Managers and Company of the Delaware and Hudson Canal Company.

JACOB D. WURTS,
County Clerk.

CHAPTER VIII.

DISCHARGE OF INSOLVENT DEBTOR FROM HIS DEBTS.—(TWO-THIRDS ACT.)

§2149. An insolvent debtor, who is a resident of the State at the time of presenting his petition, may be discharged from his debts, as prescribed in this article.

The act for relief of debtors on proceedings similar to those herein provided for was originally known as the Three-Fourths Act, and was modified and subsequently enacted by the Revised Statutes, so as to require the consent of two-thirds instead of three-fourths of

the creditors. It was for some time in abeyance under the United States Bankrupt Law, but now constitutes the only procedure by which an insolvent can obtain a discharge from his debts, and is, in the absence of a Bankrupt Act, sometimes convenient and necessary. The history of the legislation on the subject in the State is given in detail in an elaborate opinion in *American Flask Co. v. Son*, 7 Robt. 233, and the decisions on the subject collated, compared, and discussed. The act will be construed strictly, and all proceedings under it must fully comply with its provisions, since it is in derogation of the common law, and such strict compliance with the statute is a condition precedent to the discharge of an insolvent from his debts. Nor, in view of the fact that it is designed to deprive creditors of all remedy for the collection of their debts, will it be extended by implication beyond the fair and legitimate meaning of the terms employed by the legislature. *Salters v. Tobias*, 3 Paige, 339; *People v. Striker*, 24 Barb. 649; *People v. Sutherland*, 16 Hun, 192; *Merry v. Sweet*, 43 Barb. 475; *Stanton v. Ellis*, 12 N. Y. 575; *Morrow v. Freeman*, 61 id. 515. The question of what is sufficient evidence under the Revised Statutes to enable an insolvent to come within the statute was discussed in *Matter of Wrigley*, 4 Wend. 602; affirmed, 8 id. 134, where it was held that it must be a *bona fide* residence with intent to remain a resident of the State. The matter of residence is jurisdictional. *Otis v. Hitchcock*, 6 Wend. 433; *Morewood v. Hollister*, 6 N. Y. 309. An unliquidated claim for damages arising out of a tortious act is not a debt within the provisions of the statute authorizing a discharge of an insolvent. *Zinn v. Ritterman*, 2 Abb. (N. S.) 261. If an application has already been made to the Common Pleas, and after a full hearing, has been decided against the debtor on the merits, it should be regarded as *res adjudicata*, and the application denied. *Matter of Roberts*, 10 Hun, 253; reversed on another point, 70 N. Y. 5.

§ 2150. Application for such a discharge must be made, by the petition of the insolvent, addressed to the County Court of the county in which he resides; or, if he resides in the city of New York, to the Court of Common Pleas for that city and county.

The Revised Statutes provided for an application to other judicial officers. This section, as a matter of convenience, restricts the jurisdiction to the County Courts, making it a proceeding in court, and not before an officer, and in a court which is always open, as is the Common Pleas in the city of New York, and the County Courts in the several counties.

§ 2151. The petition must be in writing ; it must be signed by the insolvent, and specify his residence ; it must set forth, in substance, that he is unable to pay all his debts in full ; that he is willing to assign his property for the benefit of all his creditors, and, in all other respects, to comply with the provisions of this article, for the purpose of being discharged from his debts ; and it must pray that, upon his so doing, he may be discharged accordingly. It must be verified by the affidavit of the insolvent, annexed thereto, taken on the day of the presentation thereof, to the effect that the petition is in all respects true, in matter of fact.

The omission by the petitioning creditor to comply with the provisions of the statute prescribing certain specific matters to be contained in the petition or added to it, was held not to be a defect depriving the officer of jurisdiction, but at most an irregularity to which objection should be made before the officer. *Russell Co. v. Armstrong*, 12 Abb. 472; *Matter of Edward Phillips*, 43 Barb. 108. Though it would be otherwise if, after rejecting the debt required by that provision to be released, being a secured debt, less than two-thirds in amount of the creditors, as shown in the petition, had united in the proceeding. *Morewood v. Hollister*, 2 Seld. 309. The affidavit cannot be sworn to before another officer authorized to administer oaths as a commissioner, and if so verified is void ; it must be sworn to before the officer entertaining the proceeding, and the defect cannot be corrected by making a new affidavit on the hearing. *Small v. Wheaton*, 2 Abb. 175. If not sworn to before the judge entertaining the proceeding or subscribed by him prior to granting the order for the creditors to show cause, it is a fatal defect, which renders the assignment and discharge void, and a subsequent verification of the petition will not cure the defect. *Ely v. Cooke*, 38 N. Y. 365. A petition which shows on its face that it is not signed by two-thirds of the creditors gives the officer no jurisdiction, and a discharge based on it is void. *Morrow v. Freeman*, 61 N. Y. 515 ; citing 7 Johns. 75 ; 3 Paige, 338 ; 28 Barb. 416 ; 12 N. Y. 575.

Precedent for Petition.

To the County Court of Ulster County :

The petition of Charles Ramsay, an insolvent debtor, respectfully shows:

First.—That your petitioner resides at the town of Esopus, in the county of Ulster, and State of New York.

Second.—That he is an insolvent debtor, and is unable to pay all his debts in full.

Third.—That he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of article 1, of title 1, of chapter 17, of the Code of Civil Procedure, for the purpose of being discharged from his debts.

Wherefore your petitioner prays that upon his so doing he may be discharged accordingly.

Dated *September 1, 1882.*

CHARLES RAMSAY.

ULSTER COUNTY, ss.:

Charles Ramsay, of said county, being duly sworn, says that he is the petitioner in the annexed petition named; that he knows the contents thereof, and that said petition is in all respects true in matter of fact.

CHARLES RAMSAY.

Subscribed and sworn to before me, }
this 29th day of September, 1882. }

WM. LAWTON,

County Judge of Ulster County.

§ 2152. The petitioner must annex to his petition one or more written instruments, executed by one or more of his creditors, residing in the United States, having debts owing to him or them in good faith, then due or thereafter to become due, which amount to not less than two-thirds of all the debts owing by the petitioner to creditors residing within the United States. Each instrument must be to the effect that the person or corporation executing it consents to the discharge of the petitioner from his debts, upon his complying with the provisions of this article.

It was said that the fact that the petitioners are not creditors for two-thirds of the aggregate of the insolvent's debts is sufficient to prevent granting a discharge, though not ground for avoiding it after it has been granted. *Emberson's Case*, 16 Abb. 457; *Small v. Graves*, 7 Barb. 576; *Ayres v. Scribner*, 17 Wend. 407. But in *Morrow v. Freeman*, 61 N. Y. 515, it was determined that where this fact appeared on the face of the proceedings, the discharge was invalid. A creditor who has the body of his creditor in execution cannot be a petitioning creditor under the statute. *Beaty v. Beaty*, 2 Johns. Ch. 430. But the arrest and detention only amounts to a satisfaction of the judgment for the time, and after the creditor is discharged from arrest, the creditor may petition as if no arrest had been made. *Fassett v. Tallmage*, 15 Abb. 205. Under the Revised Statutes the affidavits must set forth the nature of the demands and the general ground and consideration of the indebtedness, or jurisdiction was not acquired under the provisions of the statute. *Merry v. Sweet*, 43 Barb. 476. Names without amounts attached to consents are of no avail. *Rusher v. Sherman*, 28 Barb. 416; *Stanton v. Ellis*, 12 N. Y. 575.

Consent of Creditors to be Annexed to Petition.

We, the undersigned, creditors of Charles Ramsey, of the town of Esopus, in the county of Ulster, an insolvent debtor having debts due

to us, in good faith, to the amount severally set opposite our names upon the accounts, notes and securities, copies of which are hereto annexed, hereby consent to the discharge of the said Charles Ramsey from his debts, upon his complying with the provisions of article 1 of title 1 of chapter 17 of the Code of Civil Procedure. We hereby nominate Anthony Benson as trustee in this proceeding.

Dated Oct. 1, 1882.

Name of Creditor.	Amount of debt owing.
W. F. Romer.....	\$8,618 50
G. N. Van Deusen	6,818 44
Eliza Wilson, as Executrix of A. P. Wilson, deceased....	12,469 50
Delia O'Neil.....	2,982 23

(Add acknowledgment.)

§ 2153. An executor or administrator may become a consenting creditor under the order of the Surrogate's Court from which his letters issued. A trustee, official assignee or receiver of the property of a creditor of the petitioner, whether created by operation of law or by the act of parties, may become a consenting creditor under the order of a justice of the Supreme Court. A person who becomes a consenting creditor, as prescribed in this section, is chargeable only for the sum which he actually receives, as a dividend of the insolvent's property.

This is a re-enactment of the Laws of 1850, which changed the rule as it was held in *Matter of Sherryd*, 2 Paige, 602.

§ 2154. Where a corporation or joint-stock association becomes a consenting creditor, its consent must be executed under its common seal, and may be attested by any director or other officer thereof, duly authorized for that purpose, who may make any affidavit required of a creditor in the proceedings.

§ 2155. Where a partnership becomes a consenting creditor, the consent may be executed in its behalf, and any affidavit required of a creditor in the proceedings, may be made by either of the partners.

§ 2156. A creditor's consent does not affect his remedy against any person or persons indebted jointly with the petitioner; and the petitioner's discharge has the effect, as between the creditor and the other joint debtors, of a composition between the petitioner and the creditor, made as prescribed in article 3 of title 5 of chapter 15 of this act.

A petitioning creditor, who adds to his signature the declaration of release, thereby transfers to the assignee every and any lien or security upon the estate and property of the debtor, not a lien or security upon the property of a third person; when, therefore, such creditor has a joint judgment against two, the signing of the petition of one does not transfer to the assignee his claim against, or lien upon, the property of the other. *Ellsworth v. Caldwell*, 27 How. 188; affirmed, 48 N. Y. 680.

§ 2157. Where a consenting creditor is the purchaser or assignee of a debt against the petitioner, or the executor, administrator, trustee or receiver of such a purchaser or assignee, he is deemed, for all the purposes of this article, except

as to the declaration and receipt of dividends, a creditor only to the amount actually and in good faith paid for the debt, by him or by the decedent or other person from whom he derives title, and remaining uncollected. This section is not affected by the recovery of a judgment for the debt after the purchase or assignment; but in that case the consenting creditor may include the uncollected costs, as if they were part of the sum paid for the debt.

In *Slidell v. McCrea*, 1 Wend. 156, under the former statute it was held that where the debtor procured a friendly creditor to purchase an outstanding indebtedness for less than its face, and the purchaser afterward joined in the petition for the debtor's discharge, placing the debt at its full value or amount, and without it two-thirds did not join, that the discharge was void. This rule was not applied where a purchaser had, sometime previous to the application and without the knowledge of the debtor, obtained the claim and held it for its full amount. The mere purchase of a claim for less than its face and signing the petition for the full amount, would not vitiate the discharge. Where the liability of an insolvent, as indorser upon unpaid promissory notes, has become fixed by protest and notice, the holders of the protested paper may join in the petition, and the debts they represent are to be counted in determining whether or not the requisite amount is represented in the petition. This is because the discharge operates upon these obligations. *People v. Sutherland*, 81 N. Y. 1. One who has become a creditor of an insolvent, knowing him to be such, by buying a demand against him for less than its amount, cannot, by suing and recovering judgment for the whole amount, entitle himself to be considered a creditor to the actual amount paid for the debt or demand, and prosecuting the debt to judgment does not alter the case. *Emberson's Case*, 16 Abb. 457. Where the assignee of a demand petitions as a creditor, to the full amount, instead of to the amount which he paid for it, the discharge is not void, unless it is shown that the insolvent did not act in good faith. *Small v. Graves*, 7 Barb. 576.

§ 2158. A creditor who has, in his own name, or in trust for him, a mortgage, judgment or other security for the payment of a sum of money, which is a lien upon, or otherwise affects real or personal property belonging to the petitioner, or transferred by him since the lien was created, cannot become a consenting creditor, with respect to the debt so secured, unless he adds to or includes in his consent, a written declaration, under his hand, to the effect that he relinquishes the mortgage, judgment or other security, so far as it affects that property, to the trustees to be appointed pursuant to the petition, for the benefit of all the creditors. Such a declaration operates, to that extent, as an assignment to the trustee, of the mortgage, judgment or other security, and vests in him accordingly all the right and interest of the consenting creditor therein.

Where such creditors have security for any part of the debts due them, and neglect to sign the declaration required by the statute, they will not be regarded by the statute as petitioners with regard to the debts so secured, and when, after rejecting such debts, less than two-thirds in amount of the creditors of the insolvent, as shown by the petition, have joined in signing and presenting it, the officer to whom it is presented obtains no jurisdiction to grant a discharge. *Morewood v. Hollister*, 2 Seld. 309.

But in case two-thirds in amount of the creditors, exclusive of such debts, have joined in the proceeding, it seems such omission would be only an irregularity which would be waived, unless objection is made on the hearing. *Russell Manuf. Co. v. Armstrong*, 12 Abb. 472. It is said in *Soule v. Chase*, 1 Robertson, 222, that the omission of a petitioning creditor to relinquish a security does not affect the jurisdiction or avoid the discharge; the omission of a petitioning creditor to state that he relinquished a judgment held by way of security is not a jurisdictional defect; it is a mere irregularity that may be cured by amendment. *Ex parte Phillips*, 43 Barb. 108; *Russell Manuf. Co. v. Armstrong*, 12 Abb. 472. An indorsement on the petition by a judgment creditor, stating that he "releases to the assignee to be appointed, all claims on the estate of the debtor, that I may have by reason of the judgment against him assigned to me," is sufficient. *Augsbury v. Crossman*, 10 Hun, 389. A petitioning creditor whose debt is secured must annex a declaration relinquishing such securities for the benefit of all the creditors. *Morewood v. Hollister*, 6 N. Y. 309. It is only claims against the insolvent which must be released; it does not affect a joint judgment as to a third party. *Elsworth v. Caldwell*, 48 N. Y. 680. When a creditor has his debtor imprisoned on execution, he cannot be a petitioning creditor, since the imprisonment, so long as it continues, is a satisfaction. *Beaty v. Beaty*, 2 Johns. Ch. 430; *Koenig v. Steckel*, 58 N. Y. 475.

Consent of Secured Creditor.

The undersigned creditors of Charles Ramsey of Esopus, in the county of Ulster, an insolvent debtor, having debts owing to us in good faith to the amounts severally set opposite our names, upon the securities hereinafter described, hereby consent to the discharge of the said Charles Ramsey from his debts, upon his complying with the provisions of article 1 of title 1 of chapter 17 of the Code of Civil Procedure. And whereas the undersigned have and hold certain mortgages which are a lien upon the real estate belonging to the said Charles Ramsey, namely:

The Ulster County Savings Institution, mortgage dated July 24, 1880, to secure the sum of \$3,530.43, upon premises described therein as follows (here describe premises):

The Rondout Savings Bank, a mortgage dated September 30, 1880, for \$2,696.97, upon the premises therein described as follows (insert description), which said mortgages are held to secure the payment of the aforesaid sums. Now, pursuant to statute, we, the undersigned, do hereby relinquish the said mortgages to the trustee to be appointed pursuant to the petition of said Charles Ramsey, for the benefit of all his creditors, and do hereby nominate Anthony Benson as such trustee.

THE ULSTER COUNTY SAVINGS INSTITUTION,
[L. S.] By A. H. BRUYN, *President*.
THE RONDOUT SAVINGS BANK,
By THOMAS CORNELL, *President*.

(Add acknowledgment.)

§ 2159. If a creditor knowingly swears, in any proceedings authorized by this article, that the petitioner is, or will become indebted to him, in a sum of money, which is not really due, or thereafter to become due; or in more than the true amount; or that more was paid for a debt, which was purchased or assigned, than the sum actually and in good faith paid therefor; he forfeits to the trustee, to be recovered in an action, twice the sum so falsely sworn to.

§ 2160. The consent of a creditor must be accompanied with his affidavit, stating as follows:

1. That the petitioner is justly indebted to him, or will become indebted to him at a future day specified therein, in a sum therein specified; and if he, or the person from whom he derives title, is or was the purchaser or assignee of the debt, he must also specify the sum actually and in good faith paid for the debt, as prescribed in section two thousand one hundred and fifty-seven of this act.

2. The nature of the demand, and whether it arose upon written security, or otherwise, with the general ground or consideration of the indebtedness.

3. That neither he, nor any person to his use, has received from the petitioner, or from any other person, payment of a demand, or any part thereof, in money or in any other way, or any gift or reward of any kind, upon an express or implied trust, confidence, or understanding, that he should consent to the discharge of the petitioner.

Where a consenting creditor is an executor, administrator, trustee, receiver, or assignee, he may state the necessary facts, in his affidavit, upon information and belief, setting forth therein the grounds of his belief; but in that case, the consent must also be accompanied with the affidavit of the insolvent, to the effect that all the matters of fact stated in the affidavit of the consenting creditor, are true.

A petitioning creditor's affidavit, that the sum annexed to his name is justly due to him from the insolvent for two promissory notes specified, does not state the nature of his demand "with the general ground and consideration of the indebtedness;" and if the claim so stated is necessary to make up the requisite two-thirds, the judge does not gain jurisdiction. *Gillies v. Crawford*, 2 Hilt. 338; *Merry v. Sweet*, 43 Barb. 475. Stating that the sum is justly due to him from the insolvent for goods, wares and merchandise, sold

and delivered, secured by indorsement of a note specified, held good. *Pratt v. Chase*, 29 How. 296. See *Matter of Cook*, 15 Johns. 183. If the petition fails to state grounds of indebtedness, and the defect is amended upon objection taken before the judge, the discharge will be valid. *Matter of Hurst*, 7 Wend. 239; *Small v. Wheaton*, 2 Abb. 275. If he fails to amend at the hearing and his application is denied for that reason, he may afterward move for a rehearing and for leave to amend, but he must first procure the order denying his application to be set aside, that order being properly the end of the proceeding. *Matter of Rosenberg*, 10 Abb. (N. S.) 450. Where the affidavits of the petitioning creditors were made in another State, sworn to before a commissioner residing in another State, a certificate of the secretary of State of that State is not necessary to confer jurisdiction. *Rusher v. Sherman*, 28 Barb. 416.

Precedent for Affidavit for Creditor.

STATE OF NEW YORK, }
County of Ulster, } ss.:

Eliza Wilson, of said county, being duly sworn, says that she is the executrix of Aaron P. Wilson, deceased, and as such executrix is one of the creditors named in the accompanying consent to the discharge of Charles Ramsey, an insolvent debtor. That deponent is a resident of Union avenue in the city of Kingston, Ulster county, N. Y. That said Charles Ramsey is justly indebted to this deponent as such executrix in the sum of \$12,469.56. The said indebtedness arose upon the following facts: The said Ramsey borrowed of said estate the sum of \$12,000, and to secure such sum gave his note to said estate of date of October 15, 1879, for \$12,000. That said estate is now the owner and holder of said note; that deponent, as such executrix, has not, nor has said estate, any other security, written or otherwise, for the payment of said debt. That deponent has not, nor has any person to her use, or to the use of said estate, received from the said Ramsey, or from any other person, payment of said demand, or any part thereof, in money or in any other way, or any gift or reward of any kind upon an express or implied trust, confidence or understanding that she should consent to the discharge of the said Ramsey. The said deponent makes this affidavit of her personal knowledge. And that letters testamentary were duly issued to this deponent on the estate of Aaron P. Wilson, deceased, out of the Surrogate's Court of Ulster county on the 12th day of May, 1880. That on the 1st day of September, 1882, an order was duly made and entered in said court, authorizing this deponent to become a consenting creditor in this matter, pursuant to the provisions of section 2153 of the Code of Civil Procedure.

(*Jurat.*)

(*Signature.*)

§ 2161. A consenting creditor, residing without the State, and within the United States, must annex to his consent the original accounts, or sworn copies thereof,

and the original specialties or other written securities, if any, upon which his demand arose or depends.

The omission of petitioning creditors, who reside in other States, to annex the original accounts or sworn copies, and the original specialties or securities, if any, on which their demands arise, is fatal to the proceedings, and the defect cannot be supplied on the hearing. *Warrin's Case*, 16 Abb. 457, n.

§ 2162. The petitioner must annex to his petition a schedule, containing :

1. A full and true account of all his creditors.
2. A statement of the place of residence of each creditor, if it is known; or, if it is not known, a statement of that fact.
3. A statement of the sum which he owes to each creditor, and the nature of each debt or demand, whether arising on written security, on account, or otherwise.
4. A statement of the true cause and consideration of his indebtedness to each creditor, and the place where the indebtedness accrued.
5. A statement of any existing judgment, mortgage, or collateral or other security, for the payment of the debt.
6. A full and true inventory of all his property, in law or in equity, of the incumbrances existing thereon, and of all the books, vouchers, and securities relating thereto.

The petition and schedule need not state the grounds of creditor's demands with the particularity required for a confession of judgment. *Soule v. Chase*, 1 Robt. 222. When it appears, from the papers presented, that the true cause and consideration of the alleged indebtedness of an insolvent debtor to a creditor are not set forth in the schedule, this is a matter proper for the consideration and determination of the officer before whom the matter is heard, and except as to those matters which the statute holds sufficient to bar a discharge, the creditors having notice, and failing to appear and make objection, will be concluded in case the officer has jurisdiction. *People v. Striker*, 24 Barb. 649. The statement as to the cause of a debt that it is "on account" on a judgment "on a promissory note," is insufficient. *Merry v. Sweet*, 43 Barb. 475. It will not invalidate a discharge where there is a simple misstatement of amount due any creditor, nor where the name of the creditor is omitted from the schedule; to have that effect, it must appear that the omissions were fraudulent. *American Flask Co. v. Son*, 7 Robt. 233; *Small v. Graves*, 7 Barb. 576; *Soule v. Chase*, 1 Abb. (N. S.) 48; *Matter of Hurst*, 7 Wend. 239; *Ayres v. Scribner*, 17 id. 407. And where a debtor was discharged under the laws of another State relating to insolvency, he was relieved from liability for the debt, although his name was omitted from the schedule in

the proceedings, and he had no notice of the proceedings, the omission having been by mistake or inadvertence and not fraudulent or willful. *Hall v. Robbins*, 4 Lans. 463. The debtor's schedule must not, however, be defective in respect to matters necessary to confer jurisdiction on the officer. The amount due each creditor named cannot be omitted, nor can a blank be left opposite the name of one of the creditors named, and no sum given. These defects are jurisdictional, which render the discharge void, notwithstanding the recital that two-thirds in amount of the creditors united in the petition, and that it satisfactorily appeared to the officer that the insolvent had in all respects complied with the statute. *Stanton v. Ellis*, 2 Kern. 575. The nature of the debt, and the true cause and consideration of it must appear. *Slidell v. McRea*, 1 Wend. 156; *Matter of Cook*, 15 Johns. 83; *McNair v. Gilbert*, 3 Wend. 344; *Stanton v. Ellis*, 12 N. Y. 575. This is held when the question arises collaterally. But see *Merry v. Sweet*, 43 Barb. 476; *Schaeffer v. Soule*, 23 Hun, 583. The schedule may be amended on the return day. *Matter of Hurst*, 7 Wend. 239; *Brodie v. Stephens*, 2 Johns. 289; *Matter of Rosenburg*, 10 Abb. (N. S.) 450; *Morewood v. Hollister*, 2 Seld. 311. The trust resulting to a debtor in respect to any surplus that may remain after payment of debts under an order appointing a receiver of his property, or under a general assignment for the benefit of creditors, is an interest which he must disclose and assign in proceedings to obtain a discharge from his debts. *Billings' Case*, 21 How. 448; *Bullymore v. Cooper*, 46 N. Y. 236. If the schedule annexed to the petition state the consideration of the plaintiff's debt as "notes and open accounts for money loaned and interest thereon," it is sufficient to support the jurisdiction. *Schaeffer v. Soule*, 23 Hun, 583. Where an action is brought upon an application which was obtained by false representations, the fraud is no part of the consideration of the debt, and it is not, therefore, necessary to set it forth in a petition for a discharge in order to give jurisdiction, and the debtor, having been discharged in the insolvency proceedings, is entitled to have the judgment in the action marked satisfied, and he is no longer liable to arrest. *Schaeffer v. Soule*, 23 Hun, 583. On the return day the schedules may be amended. *Brodie v. Stephens*, 2 Johns. 289; *Matter of Hurst*, 7 Wend. 239; *Matter of Rosenburg*, 10 Abb. (N. S.) 450.

SCHEDULE OF CREDITORS OF CHARLES RAMSKY, PURSUANT TO SECTION 2162 OF THE CODE OF CIVIL PROCEDURE.

A full and true account of all the creditors of Charles Ramsey, an insolvent debtor, with the place of residence of each, the sum owing to each of them by the said insolvent, and the nature of each debt or demand, with the true cause and consideration thereof, and the place where the same accrued, and the existing judgments, mortgages or collateral security, or other security for the payment of the same. Dated Sept. 1, 1882.

CREDITORS.	Residence.	Amount.	Nature of debt or demand, whether arising on written security on account or otherwise, and true cause and consideration thereof.	Accrued at	Statement of any existing judgments, mortgage or collateral, or other security for its payment.
William F. Romer...	Kingsdon City, Ulster Co., N. Y.	\$8,618 50	Indebtedness arose for notes indorsed by Romer for said Ramsey, and subsequently paid by said Romer, excepting one note of \$2,000, which was for money loaned to Ramsey by Romer & Trempier, afterward paid by Romer, and which secured notes now belonging to Romer, and are mentioned in this schedule.	Kingsdon, Ulster Co., N. Y.	This indebtedness is evidenced by notes of said Ramsey, one dated October 16, 1878, indorsed by Romer & Trempier, for \$2,000. Note dated April 13, 1880, to order of said Romer for \$1,500. Like note due May 3, 1880, for \$3,000. Like note due May 17, 1880, for \$2,800, less some payments.
Geo. N. Van Deusen.	Kingsdon City, Ulster Co., N. Y.	\$6,867 44	Indebtedness arose from notes indorsed by said Van Deusen, and subsequently paid by him, notes of Ramsey and for him to pay. Notes now belong to Van Deusen, and are mentioned in this schedule; one payment has been made on debt.	Kingsdon, Ulster Co., N. Y.	This indebtedness is evidenced by notes of said Ramsey, one for \$4,000 and interest from Feb. 2, 1880; one for \$1,200 due April 16, 1880; one for \$2,800 due May 17, 1880; one for \$1,200 due June 6, 1880. On these notes the said Van Deusen was surety or first indorser. He held as collateral 1/16 shares of stock of Nat. Bank of London, the value of \$1,800, which has been credited.
Treadwell, Slote & Co.	New York City.	\$3,127 80	Indebtedness arose for goods, wares and merchandise sold and delivered during six years last past, and on account of indebtedness of a firm of which Charles Ramsey was formerly a member and which he agreed to pay.	New York City.	This indebtedness is secured by a collateral mortgage on the property of Ramsey, situated in the city of Brooklyn, and partially by indorsed notes.

(Add inventory of property under heading as in subdivision 6 of section.) (Add debtor's affidavit, § 2163.)

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§ 2163. An affidavit, in the following form, subscribed and taken by the petitioner before the county judge, or, in the city of New York, before the judge holding the term of the court at which the order specified in the next section is made, must be annexed to the schedule:

"I, ———, do swear" (or "affirm," as the case may be,) "that the matters of fact stated in the schedule hereto annexed, are, in all respects, just and true; that I have not at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property in order to defraud any of my creditors; that I have not, in any instance, created or acknowledged a debt for a greater sum than I honestly and truly owed; and that I have not paid, secured to be paid, or in any way compounded with any of my creditors, with a view fraudulently to obtain the prayer of my petition."

An affidavit made before a commissioner of deeds is insufficient, and the proceedings held invalid for that reason; and it was required, under the statute allowing the proceeding to be taken before a judge, that the affidavit must be sworn to before the officer to whom the petition was presented, in order to give jurisdiction to grant the discharge. *Small v. Wheaton*, 2 Abb. 175; *Ely v. Cook*, 2 Hilt. 406; affirmed, 28 N. Y. 365. And the same cases hold it does not remedy the defect, notwithstanding on the day on which the order to show cause is returnable, the officer signed the *jurat* to the affidavit, nor by permitting the insolvent to make an additional affidavit before the officer. Where the insolvent's affidavit, instead of stating that he had not disposed of or made over any part of his estate for the future benefit of himself or his family, stated that he had not disposed of or made over any part of his estate for the future benefit of himself *and* his family, it was held that the discharge granted upon it was void. *Hale v. Sweet*, 43 Barb. 475; affirmed, 40 N. Y. 97. A judgment confessed, with a view to petitioning, followed by a levy and sale, amounts to an assignment, and though done in trust for all creditors equally, it is a fraud on the act and vitiates the discharge. *Matter of Hurst*, 7 Wend. 239.

§ 2164. The petition and other papers specified in the foregoing sections of this article, must be presented to the court and filed with the clerk. The court must thereupon make an order, requiring all the creditors of the petitioner to show cause before it, at a time and place therein specified, why an assignment of the insolvent's property should not be made, and he be thereupon discharged from his debts, as prescribed in this article; and directing that the order be published and served, as prescribed in the next section.

A notice stating that the proceeding is for the discharge of an insolvent need not specify the particular statute, and a defective

DISCHARGE OF INSOLVENT DEBTOR FROM HIS DEBTS. 177

reference to the statute does not vitiate the order. *Souls v. Chase*, 1 Abb. (N. S.) 48. But see 39 N. Y. 342.

Precedent for Order to Show Cause.

At a term of the County Court of Ulster county, held at the chambers of the county judge of said county, on the 29th day of September, 1882:

Present—Hon. William Lawton, *County Judge*.

In the Matter of the Application of
Charles Ramsey, an Insolvent Debtor,
for his discharge from his debts.

On reading and filing the petition of Charles Ramsey, an insolvent debtor, verified on this 29th day of September, 1882, the consents and affidavits of the following creditors of said Ramsey, viz.: William E. Romer, George N. Van Deusen, Eliza Wilson, executrix of A. P. Wilson, deceased, W. B. Crane, Turck & Burhans, the affidavit of Charles Ramsey, verified September 8, 1882, the order of the surrogate of Ulster county, granted September 25, 1882, authorizing the executrix of A. P. Wilson, deceased, to sign consent, and the affidavit of Charles Ramsey, verified the 29th day of September, 1882, with the accompanying schedules, and on motion of A. W. Cooper, attorney for said petitioner, it is

Ordered, that all the creditors of the said Charles Ramsey show cause before this court, at a term thereof to be held at the chambers of the county judge of Ulster county, in the city of Kingston, said county, on the 20th day of December, 1882, at two o'clock in the afternoon of that day, why an assignment of said insolvent's property should not be made, and he be thereupon discharged from his debts, as prescribed in article 1 of title 1 of chapter 17 of the Code of Civil Procedure.

That a copy of this order be published in the *Albany Evening Journal*, the newspaper printed at Albany (see statute as to State paper enacted since Code) in which legal notices are required by law to be published, and in the *Leader*, a newspaper published in the county of Ulster, at least once in each of the ten weeks immediately preceding the said 20th day of December, 1882.

That the petitioner also cause to be served upon each creditor of the said Charles Ramsey, residing within the United States, whose place of residence is known to him, a copy of this order, either personally or at least twenty days before the said 20th day of December, 1882, or by depositing it at least forty days before that day in the post-office, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.

WM. LAWTON,
County Judge of Ulster County.

§ 2165. The order must be published and served in the following manner:

1. The petitioner must cause a copy thereof to be published in the newspaper printed at Albany, in which legal notices are required by law to be published, and in a newspaper, designated in the order, published in the county; and, also, if one-fourth part of the insolvent's debts accrued or are due to creditors residing

in the city of New York, in a newspaper published in that city, designated in the order. The publication must be made at least once in each of the ten weeks immediately preceding the day on which cause is to be shown, unless all the creditors reside within one hundred miles of the place where cause is to be shown; in which case the publication must be made at least once in each of the six weeks immediately preceding that day.

2. The petitioner must also serve upon each creditor residing within the United States, whose place of residence is known to him, a copy of the order to show cause, either personally, at least twenty days before the day when cause is to be shown, or by depositing it, at least forty days before that day, in the post-office, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.

Where the State is a creditor of the petitioner, a copy of the order must be served upon the attorney-general, who must represent the State in the subsequent proceedings.

It will be noticed that the order itself must now be published and served, and not a notice of its contents, as formerly. Due publication and service was held necessary to give the officer jurisdiction and to authorize him to grant a discharge so as to bar creditors. *Stanton v. Ellis*, 16 Barb. 319; *Matter of Underwood*, 3 Cow. 59; *People, ex rel. Demarest, v. Gray*, 19 How. 238; *People v. Daly*, 4 Hun, 641. It is doubtful whether the question can be raised, however, except upon a direct proceeding to review, either by *certiorari* or appeal. *Rusher v. Sherman*, 28 Barb. 416. In computing the time for the publication and service of the notice, the rule is held in like cases to be to exclude the first day and include the last. *Westgate v. Handlin*, 7 How. 372; *Dayton v. McIntyre*, 5 id. 117; *Bunce v. Reed*, 16 Barb. 347; *Steinle v. Bell*, 12 Abb. (N. S.) 171. As to what was held sufficient service by mail, see *Hornby v. Cramer*, 12 How. 490; *Bunce v. Reed*, 16 Barb. 347; *Steinle v. Bell*, 12 Abb. (N. S.) 171. If notice is directed to be published six weeks, first publication must be at least forty-two days before day appointed; if ten weeks, at least seventy days before such day, and publication must be made in every intervening week until the expiration of the time. *Anonymous*, 1 Wend. 90; *People v. Grey*, 19 How. 238. The officer has no jurisdiction, if, in any of the ten weeks, there was no publication, and an order for an assignment made in such case is a nullity. *Dieckerhoff v. Ahlborn*, 2 Abb. N. C. 372. The discharge is void if the only proof of notice for creditors to appear was of a notice purporting to be returnable at a date subsequent to that on which the discharge was granted. *Lewis v. Page*, 8 Abb. (N. S.) 200. Until publication of a notice of application of a debtor to be discharged from imprisonment is made, the officer is without jurisdiction. *People v. Daly*, 4 Hun, 641

This case more fully, 67 Barb. 325, holding that a mistake in the designation of the return day in the notice, as published in one of the papers, is fatal to jurisdiction, there being no appearance. Where the insolvent is ignorant of, and cannot ascertain, the street number or exact address of one or more of all the creditors, it is a sufficient compliance with the statute to mail the notice addressed to the city or town where creditor or creditors to be served reside. *People v. Sutherland*, 81 N. Y. 1. But, when the order provided for service on creditor at his "place of business," instead of at his "usual place of residence," and it was so served, it was held that the service was not made in the manner prescribed by the statute, and the court did not acquire jurisdiction to grant a discharge, and the court refused to receive proof of personal service on the creditor on the ground that jurisdiction to grant the discharge must appear in the record. *Billings v. Pickert*, 39 Hun, 504. A mistake in the spelling of the name of a creditor to whom notice is addressed, the error being the substitution of one letter merely for another without effect upon the sound, and in case where there was a description of the person, does not affect the proceeding. *People v. Sutherland*, 81 N. Y. 1.

§ 2166. On the day specified in the order, and before any other proceedings are taken in the matter, the petitioner must present to the court and file with the clerk, proof, to the satisfaction of the court, that the order has been published and served, as prescribed in the last section; and thereupon, on the same day, or upon the day to which the hearing is adjourned, the court must hear the allegations and proofs of the parties appearing. Proof of personal service of a copy of the order upon any person, must be made in like manner as proof of personal service of a summons in an action brought in the Supreme Court.

The officer is not bound to wait for parties beyond the arrival of the precise time appointed, though he may do so in his discretion. The proceedings, however, would be vacated if any trick or artifice is practiced by which parties are prevented from appearing at the precise time appointed. *Ex parte Hagaman*, 2 Hill, 415; *Matter of Pulver*, 6 Wend. 632; *Matter of Bradstreet*, 13 Johns. 385. Due legal proof of publication and service of notice is necessary in order to give the officer jurisdiction, and without such proof he has no authority to grant the discharge or any of the necessary orders prior thereto; an affidavit sworn to before an officer having no power to take it is insufficient. *Stanton v. Ellis*, 16 Barb. 319; *Lewis v. Page*, 8 Abb. (N. S.) 200; *contra*, *Souls v. Chase*, 1 id. 48; reversed, 39 N. Y. 342. Although if the officer, without such proof, assumes to act and grants a discharge, it has been held bind-

ing, except in a direct proceeding to review the decision. *Rusher v. Sherman*, 28 Barb. 406; *Stanton v. Ellis*, 12 N. Y. 575. In *Soule v. Chase*, *supra*, it is held that proof of publication is not limited to the affidavit of the parties or his clerk. But see 39 Hun, 504, *supra*. The creditors may appear at the time appointed in the order and contest the right of the insolvent to a discharge, but if, after having been properly served, they neglect to appear and object, they will be concluded by the proceedings in case the officer has jurisdiction, except as to matters declared fatal by statute. *People v. Stryker*, 24 Barb. 649; *Matter of Bradstreet*, 13 Johns. 385. But it is only creditors who are recognized as such by the insolvent in his schedules who may appear and contest. All others, when they come in to oppose the discharge, must first prove their claims as subsisting ones, otherwise they are not authorized to appear and oppose. *Avery's Case*, 6 Abb. 144.

By "proof satisfactory to the officer" before whom the proceedings are had, is meant such evidence as is necessary to convince him judicially, and not arbitrarily or capriciously. He is not to be satisfied by proof legally insufficient, neither can he withhold his satisfaction when proof, which the law deems adequate, is presented to him. *People v. Sutherland*, 81 N. Y. 1.

§ 2167. Where the insolvent's discharge is opposed, the court may direct the special proceeding to be placed upon the calendar for trial. In that case the parties must appear, and the proceedings are the same, as in an action, except as otherwise prescribed in this article; and costs, as in an action, except for proceedings before notice of trial, may be awarded to either party, in the discretion of the court.

Under the Revised Statutes provision was made for drawing a jury. It will be observed that no such provision now exists, and the proceeding becomes an action at issue, and is tried in the same manner. Under the next section issues may be settled for the trial.

§ 2168. In order to entitle a creditor to oppose the discharge of the insolvent, he must, on the day fixed to show cause, or at such other time as the court directs, file with the clerk a specification of his objections; and he may then, but not afterward, demand a trial, by a jury, of the questions of fact arising thereupon. If a trial by a jury is not then demanded, the questions of fact must be tried by the court, without a jury. Where one of two or more opposing creditors demands a trial by a jury, all the material questions of fact, arising upon the objections of all the creditors, must be tried in like manner, and at the same time. The court may, in its discretion, direct the questions to be settled and plainly stated, in an order, as where an order is made by the Supreme Court, in an action pending therein, for the trial of questions of fact by a jury.

In case the officer has no jurisdiction, appearing and participating

in the proceedings does not conclude creditors. *Gracie v. Sheldon*, 3 Barb. 232. Otherwise if the discharge is consented to. *Lee v. Curtiss*, 17 Johns. 85. But if they do not appear they are concluded except as to jurisdictional questions. *Matter of Bradstreet*, 13 Johns. 385; *Soule v. Chase*, 39 N. Y. 342; *People v. Stryker*, 24 Barb. 649. A creditor may examine into all the facts as to disposition of insolvent's property. *Cohen's Case*, 10 Abb. 257.

Specifications of Objections and Demand of Jury.

(Title as before.)

To the County Court of the County of Ulster :

I, Eliza Wilson, one of the creditors of the said Charles Ramsey, do hereby object to the discharge of said Charles Ramsey as an insolvent debtor, and specify the following grounds of my objections to such discharge :

1. That since the making of the schedule annexed to the petition he has transferred property of the value of \$2,000 to his wife, without consideration therefor, with intent to defraud his creditors.

2. That within two years last past he has, at different times and places, sold and transferred both real and personal property to creditors in payment of an antecedent debt. And I hereby demand that the questions of fact arising hereupon be tried by a jury.

(Date.)

(Signature of party or attorney.)

§ 2169. Where the name of an opposing creditor does not appear in the schedule, he must file, with the specification of his objections, proof, by affidavit, that he is a creditor; and, if his debt is not set forth in the schedule, he must also file his affidavit, to the effect specified in subdivisions first and second of section two thousand one hundred and sixty of this act.

The insertion in the schedule of the name of a creditor, with a memorandum that his claim is barred by limitation, is not an admission that he is a creditor, so as to entitle him to appear and oppose without proofa. *Avery's Case*, 6 Abb. 144.

§ 2170. There shall be but one trial by jury. If the jurors cannot agree, after being kept together for such a time as the court deems reasonable, the court must discharge them, and determine the questions of fact, or those questions as to which the jurors have not agreed, upon the evidence taken before the jury, as if a jury had not been demanded.

§ 2171. Where the petitioner's wife resides without the State, the court, or a judge thereof out of court, may, upon the application of any creditor, make an order, requiring the petitioner to bring his wife before the court, at the hearing or trial, to the end that she may be examined as a witness. A copy of the order must be personally served upon the petitioner, at least three weeks before the hearing. If it appears, upon the hearing, that service could not, with due diligence, be so made, in consequence of the petitioner's sickness or absence, the court may, in its discretion, adjourn the hearing or trial and prescribe the time and manner of service of the order for the adjourned day, If, after due service,

the petitioner's wife does not attend at the time and place appointed, the petitioner is not entitled to his discharge, unless he proves, to the satisfaction of the court, by his affidavit, or upon his oral examination, or otherwise, that he was unable to procure her attendance.

§ 2172. At the hearing or trial, the petitioner must be examined under oath, at the instance of any creditor, touching his property or debts, or any other matter stated in his schedule, or any changes that have occurred in the situation of his property, since the making of the schedule; and particularly whether he has collected any debts or demands, or made any transfers of, or otherwise affected his real or personal property. Any creditor may contradict or impeach, by other competent evidence, the testimony of the insolvent, or of his wife.

§ 2173. In either of the following cases, the petitioner is not entitled to a discharge:

1. Where it appears upon the hearing or trial, that, after making the schedule annexed to his petition, he has collected a debt or demand, or transferred, absolutely, conditionally, or otherwise, any of his property, not exempt by law from levy and sale by virtue of an execution, and he neglects or refuses forthwith to pay over to the clerk, the full amount of all debts and demands so collected, and the full value of all property so transferred, except so much of the money, and of the value of the property, as appears to have been necessarily expended by him for the support of himself or his family.

2. Where it appears, in like manner, that the petitioner, within two years before presenting the petition, has, in contemplation of his becoming insolvent, or of his petitioning for his discharge, or knowing of his insolvency, made an assignment, sale, or transfer, either absolute or conditional, of any of his property, or of any interest therein, or confessed a judgment, or given any security, with a view of giving a preference to a creditor for an antecedent debt.

An assignment of all the debtor's property to trustees for the payment of his debts is, against the debtor, conclusive evidence of his insolvency at the time of its execution, and such an assignment, giving preference to some creditors in the payment of their demands, is a bar to the discharge of the debtor from his debts which existed when the assignment was made. *Morewood v. Hollister*, 6 N. Y. 309. And so also the debtor will be prevented from obtaining his discharge under the statute where, in contemplation of applying for such a discharge, he confesses judgment on which his property is sold, although it be confessed to a trustee for the benefit of all his creditors without preference, the judgment and sale under it being considered a fraud under the statute. *Matter of Hurst*, 7 Wend. 239. Such assignments will, it seems, not have the effect to render the discharge invalid, but it is cause only for defeating the insolvent's application on the hearing before the officer, or, if the discharge is granted notwithstanding the objection, of reversing the proceedings on direct review. *Stryker v. Stryker*, 24 id. 649; *Rusher v. Sherman*, 28 id. 416; *Matter of Hurst*, 7 Wend. 240; *Hayden v. Palmer*, 24 id. 364. The general principle as to when an insolvent or imprisoned

debtor can obtain his discharge in different proceedings are laid down as follows: A discharge will not be denied on the ground that the petitioner's firm has made a fraudulent disposition of its property unless it is shown affirmatively that he participated therein. *Ex parte Benson*, 60 How. 314. To bar a discharge some fraudulent act must be shown committed after the liability to the opposing creditor was incurred. *Ex parte Pearce*, 29 Hun, 270. The fraud which will bar a discharge under the statute is one perpetrated in the proceeding, not one in the creation of the debt. *Develin v. Cooper*, 84 N. Y. 410. Where the schedule annexed to the petition shows the absence of jurisdiction upon its face the discharge is void. *Morrow v. Freeman*, 61 N. Y. 515. Where, upon an application made by an insolvent debtor for a discharge, it appears that a similar application has already been made to one of the judges of the Court of Common Pleas of the city of New York, and having been fully heard has been decided against him on the merits, *held*, that the matter should be regarded as *res adjudicata*, and the application denied. *Matter of Roberts*, 10 Hun, 253; reversed on another point, 70 N. Y. 5. An application for a discharge should not be denied merely because the debtor has inadvertently omitted some property from his schedule, but if, on his examination, he remembers such property, the court should allow him to amend his petition by inserting it, if satisfied that the omission was not intentional or fraudulent. *Matter of Rosenberg*, 10 Abb. (N. S.) 450. As to what facts throw suspicion upon the good faith and honesty of the proceedings of an insolvent seeking a discharge under this act, see *Cohen's Case*, 10 Abb. 257.

§ 2174. An order, directing the execution of an assignment, must be made by the court, where it appears, by the verdict of the jury; or, if a jury has not been demanded, or the jurors have been discharged by reason of their inability to agree, where it satisfactorily appears to the court, as follows:

1. That the petitioner is justly and truly indebted to the consenting creditors, in sums which amount, in the aggregate, to two-thirds of all the debts, which the petitioner owed, at the time of presenting his petition, to creditors residing within the United States.

2. That he has honestly and fairly given a true account of his property.

3. That he has, in all things, conformed to the matters required of him by this article.

When an order for assignment has been made the officer making it cannot afterward vacate it, unless there has been surprise on the opposing creditors, or they have been misled by the opposite party. *Matter of Bradstreet*, 13 Johns. 385.

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Order for an Assignment.

At a Special Term of the County Court, held at the chambers of the judge thereof, in the city of Kingston, Ulster county, on the 17th day of March, 1883:

Present — Hon. William Lawton, *County Judge of Ulster County.*

In the Matter of the Application of
Charles Ramsey, an Insolvent Debtor,
for his discharge from his debts.

It appearing to the court from the proofs of the respective parties to this proceeding that the petitioner, Charles Ramsey, is justly and truly indebted to the consenting creditors in sums which amount in the aggregate to two-thirds of all the debts which the said petitioner owed at the time of presenting his petition in this proceeding to creditors residing within the United States; that said petitioner has honestly and fairly given a true account of his property, and has in all things conformed to the matters required of him by article 1 of title 1 of chapter 17 of the Code of Civil Procedure, it is now, on reading all the papers and proceedings herein and the proofs taken herein, and on proof of due publication and service of the order requiring creditors to show cause, granted herein on the 29th day of September, 1882, and on motion of A. W. Cooper, of counsel for the petitioner, and no one opposing,

Ordered, that the petitioner, Charles Ramsey, execute to Anthony Benson, of the said city of Kingston, as trustee, who is hereby designated as a trustee for that purpose, an assignment of all his, said petitioner's property at law or in equity, in possession, reversion or remainder, excepting only so much thereof as is exempt by law from levy and sale by execution.

WILLIAM LAWTON,
County Judge of Ulster County.

§ 2175. The order must designate one or more trustees, residents of the State; and must direct the petitioner to execute, to him or them, an assignment of all his property, at law or in equity, in possession, reversion, or remainder, excepting only so much thereof as is exempt by law from levy and sale, by virtue of an execution. The assignment must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county. Where it appears, from the schedule or otherwise, that real property will pass thereby, it must be recorded also as a deed, in the proper office for recording deeds, of each county where the real property is situated.

Insolvent's Assignment.

ULSTER COUNTY COURT.

In the Matter of the Application of
Charles Ramsey, an Insolvent Debtor,
for his discharge from his debts.

Know all men by these presents, that I, Charles Ramsey, an insolvent debtor, did, in conjunction with so many of my creditors resid-

ing within the United States whose debts in good faith amount to two-thirds of all the debts owing by me to creditors residing within the United States, present a petition to the County Court of Ulster county, praying for relief, pursuant to the provisions of the statute authorizing an insolvent debtor to be discharged from his debts, whereon the said County Court ordered notice to be given to all my creditors to show cause, if any they had, before it, at a certain day and place, why the prayer of the said petition should not be granted, which notice was duly published and served as required by law, and no good cause appearing to the contrary, and the said County Court being satisfied that I have in all things conformed to those matters required by the said statute, has directed an assignment of all my estate to be made by me for the benefit of all my creditors:

Now, therefore, know ye, that in conformity to the said direction I have granted, released, assigned and set over, and by these presents do grant, release, assign and set over unto Anthony Benson, trustee, appointed to receive the same, all my estate, real and personal, both in law and equity, in possession, reversion or remainder, and all books, vouchers and securities relating thereto, to hold the same unto the said assignee to and for the use of all my creditors, except so much thereof as is exempt by law from levy and sale by virtue of an execution.

In witness whereof I have hereunto set my hand and seal, this 28th day of March, 1883.

(Add acknowledgment.)

§ 2176. The trustee or trustees may be nominated by a majority in amount of the consenting creditors. If no person is so nominated, one or more persons must be appointed by the court for the purpose. The nomination may be included in the consent, or made in a separate paper, or orally upon the hearing or trial, and entered in the minutes.

§ 2177. The assignment vests in the trustee or trustees all the petitioner's interest, legal or equitable, at the time of its execution, in any real or personal property, not exempt by law from levy and sale by virtue of an execution; and any contingent interest which may vest within three years thereafter. When a contingent interest so vests, it passes to the trustee, in the same manner as it would have vested in the petitioner, if he had not made an assignment.

An assignment of all the debtor's estate, real and personal, passes title to all the lands which he owns without further description, and, therefore, lands owned by him, though not mentioned in his inventory, pass by such assignment. *Roseboom v. Mosier*, 2 Denio, 61. Property held in trust does not pass by the assignment, and if such property remains in specie, or in goods and notes, or other choses in action, the *cestui que trust* is entitled to the property, and not the general creditors of the insolvent. Though the trust property is converted into money, yet if it is kept separate and distinct, so that it can be traced and distinguished from the general mass of the insolvent's estate, it will go to the *cestui que trust*. *Kip v. Bank of New York*, 10 Johns. 63; *Kennedy v. Strong*, id. 289. Where

property has been fraudulently conveyed by an insolvent debtor under the statute, his interest in the property passes to the assignee for the benefit of his creditors, although not embraced in the inventory. *Ward v. Van Bokkelen*, 2 Paige, 289. The assignee takes the property subject to any equitable lien in a third person. *Waddington v. Vredenburg*, 2 Johns. Cas. 227. The title to the property of the insolvent cannot be affected until it is assigned. Under the statute the insolvent may at any time terminate his proceedings, and is not bound to complete them, and he may sell the property, and although such an act would be a fraud upon the proceedings, the purchaser would obtain a good title; the creditors obtain no lien until the discharge, and the debtor is not divested of control until that time. He may make a conveyance if he sees fit. *Baily v. Burton*, 8 Wend. 339. It is said a deed, showing upon its face that it is an assignment made by an insolvent to obtain his discharge under the statute relating to voluntary assignments, is sufficient to support an action of ejectment by the assignee, where there is no affirmative evidence of any invalidity in the insolvency proceedings. *Rockwell v. Brown*, 54 N. Y. 210.

An assignment, purporting to be made under the Two-Thirds Act, is invalid as a conveyance of the insolvent's estate, at least as against one not a *bona fide* purchaser without notice, where the preliminary proceedings are void because not in conformity to the statute, so held where petition was fatally defective. *Rockwell v. McGovern*, 69 N. Y. 294. The petitioner must assign all the property he has at the time he is ordered to make the assignment, and there must be some evidence of a delivery to the assignee. *Borthwick v. Howe*, 27 Hun, 505.

§2178. Upon the production by the petitioner of a certificate of the trustees or trustees, duly acknowledged or proved, and certified in like manner as a deed to be recorded in the county, to the effect that the insolvent has assigned, for the benefit of all his creditors, all his property so directed to be assigned, and all the books, vouchers, and papers relating thereto, and that he has delivered so much thereof as is capable of delivery; and also of a certificate of the county clerk, that the assignment has been duly recorded in his office; the court must grant to the insolvent a discharge from his debts, which has the effect declared in the following sections of this article.

A discharge with the assent of two-thirds of the creditors is void unless the debtor's affidavit conforms to the statute, and will not protect his future acquisitions. Its invalidity may be set up by a future execution creditor. *Hale v. Sweet*, 40 N. Y. 97. In order to make the discharge conclusive it is necessary that the officer have

jurisdiction, and there must, for that purpose, be a petition, signed by the debtor and by two-thirds of his creditors residing within the United States, the affidavit of the petitioning creditors taken before an officer authorized to take affidavits to be used in courts of record, to the amount, nature and consideration of the debt, and that the creditor has received no consideration to become a petitioner; a full and true account of the creditors, the amounts due, the consideration, a statement of any security and a full inventory, an affidavit by the debtor and before the court, of the correctness of his petition and proof of residence within the county where proceedings are had. *Rusher v. Sherman*, 28 Barb. 416. The recitals of the discharge are conclusive evidence of all proceedings except matters going to the jurisdiction, and the record need not be produced, *Barber v. Winslow*, 12 Wend. 102; *Jenks v. Stebbins*, 11 Johns. 224; *Lester v. Thompson*, 1 id. 300; *Stanton v. Ellis*, 12 N. Y. 575; *Bullymore v. Cooper*, 46 id. 236; *Develin v. Cooper*, 84 id. 410; although it is not the only evidence of the proceedings. *Richmond v. Prait*, 24 Hun, 578. The discharge is *prima facie* evidence as to matters of jurisdiction.

Trustees' Certificate.

ULSTER COUNTY COURT.

In the Matter of the Application of
Charles Ramsey, an Insolvent Debtor,
for his discharge from his debts. }

I, Anthony Benson, of the city of Kingston, Ulster county, New York, hereby certify that Charles Ramsey, an insolvent debtor, has this day granted, conveyed, assigned and delivered to me, for the use and benefit of all his creditors, all his estate, real and personal, both in law and equity, in possession, reversion or remainder, and all books, vouchers and securities relating to the same, except so much thereof as is exempt from levy and sale by virtue of an execution, and has delivered so much thereof as is capable of delivery.

In witness whereof, I have hereunto set my hand and seal, this 28th day of March, 1883.

(Signature.)

Certificate of Record by Clerk.

STATE OF NEW YORK, }
County of Ulster, } ss.:

I, Jacob D. Wurts, clerk of the county of Ulster, do hereby certify that an assignment of all the estate, real and personal, both in law and equity, in possession, reversion and remainder, and all books, vouchers and securities relating thereto, except so much thereof as is

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exempt from levy and sale by virtue of an execution of Charles Ramsey, an insolvent debtor, made by the said Charles Ramsey to Anthony Benson to and for the use of the creditors of the said Charles Ramsey, and dated the 28th day of March, 1883, was duly recorded in the clerk's office of said county on the 28th day of March, 1883.

In witness whereof I have hereunto subscribed my name and [L. S.] affixed my official seal, this 28th day of March, 1883.

JACOB D. WURTS, *Clerk.*

Discharge.

At a term of the Ulster County Court, held in and for the county of Ulster, at the chambers of the county judge, in the city of Kingston, on the 31st day of March, 1883:

Present — Hon. William Lawton, *County Judge.*

In the Matter of the Application of
Charles Ramsey, an Insolvent Debtor,
for his discharge from his debts.

To all to whom these presents shall come or may concern:

WHEREAS, Charles Ramsey, an insolvent debtor, residing within the city of Kingston, said county of Ulster, did, in conjunction with so many of his creditors, residing within the United States, as have debts in good faith owing to them by the said insolvent, amounting to at least two-thirds of all the debts owing by him to creditors within the United States, present a petition to the Ulster County Court, on the 29th day of September, 1882, praying that the estate of the said insolvent might be assigned for the benefit of his creditors and he be discharged from his debts, pursuant to the provisions of the statute authorizing an insolvent debtor to be discharged from his debts, to which petition was annexed the schedule required by law, duly verified, with the proper consents of said creditors, accompanied by the affidavits required by law. Whereupon the said court ordered notice to be given, as required by law, to all the creditors of the said insolvent, to show cause, if any they had, before it, at a certain time and place, why an assignment of the said insolvent's estate should not be made and he be discharged from his debts; proof of the service whereof on the creditors of said insolvent, as required by law, and of the publication whereof has been duly made; and

WHEREAS, It satisfactorily appearing to the court that the proceedings on the part of the creditors are just and fair, and that the said insolvent has conformed in all things to those matters required of him by law, an order was made by said court directing an assignment to be made by the said insolvent of all his estate, real and personal, both in law and equity, in possession, reversion or remainder, except so much thereof as is exempt from levy and sale by virtue of an execution to Anthony Benson, trustee, therein designated to receive the same; and the said insolvent having, on the 28th day of March, 1883, made such assignment, and produced a certificate thereof, executed by the said trustee and duly proved, and also a certificate of the clerk of said county of Ulster that such assignment is duly recorded in his office:

Now, therefore, know ye, that by virtue of the power and authority in said court vested, the said insolvent is hereby discharged from all his debts and from imprisonment therefor, pursuant to the provisions of the said statute.

Witness, Hon. William Lawton, county judge of Ulster [L. S.] county, at his chambers in said city of Kingston, county of Ulster and State of New York, this 31st day of March, 1883.

WM. LAWTON,
County Judge of Ulster County.

JACOB D. WURTS,
Clerk of Ulster County and County Court.

§ 2179. If a trustee refuses or neglects, upon payment or tender by the petitioner of the expense of so doing, to execute or acknowledge a certificate, as prescribed in the last section, or to cause the assignment to be recorded, as therein prescribed, the court, upon proof by affidavit of the facts, must make an order, requiring the trustee to show cause, at a time and place therein specified, why the petitioner should not be discharged, notwithstanding his neglect or refusal; and why the trustee's appointment should not be revoked.

§ 2180. If, upon the return of the order, it appears that the assignment has been duly executed, and that the petitioner has duly delivered all his property directed to be assigned, and all the books, vouchers, and papers relating thereto, which are capable of delivery, the court may, either:

1. Grant a discharge of the petitioner, notwithstanding the neglect or refusal of the trustee; or

2. Make an order, revoking the appointment of the trustee. Upon the entry of such an order, the powers of the trustee, and his interest in the assigned property, cease. If there is no other trustee, the court must, by the same or another order, appoint one or more new trustees. Such an appointment has the same effect, as if the person or persons so appointed were named as trustees in the original assignment.

§ 2181. The discharge, and the petition, affidavits, orders, schedule, and other papers, upon which the discharge is granted, exclusive of the minutes of testimony, must be recorded in the clerk's office of the county, within three months after the discharge is granted. In default thereof, the discharge becomes inoperative, from and after that time. The original discharge, the record thereof, or a transcript of the record duly authenticated, is conclusive evidence of the proceedings and facts therein contained. The other papers specified in this section, the record thereof, or a transcript of the record duly authenticated, are presumptive evidence of the proceedings and facts therein contained.

It was held in *Barnes v. Gill*, 13 Abb. (N. S.) 164, that the omission to file the papers leaves the discharge inoperative until they are filed, and a levy made meanwhile is valid, and the right vesting under it is not affected by the subsequent filing of the papers. The discharge is made operative from the time of filing, upon debts which were due at or before the filing of the discharge, and this case was followed in *Mills v. Hildreth*, 5 Hun, 364. It will be seen that as to the effect of subsequent filing the provisions of this section differ from the statute under which these decisions are made.

190 DISCHARGE OF INSOLVENT DEBTOR FROM HIS DEBTS.

§ 2182. [Am'd, 1883.] Except as prescribed in the next two sections, a discharge granted as prescribed in this article, exonerates and discharges the petitioner from every debt due at the time when he executed his assignment, including a debt contracted before that time, though payable afterward, and from every liability incurred by him, by making or indorsing a promissory note, or by accepting, drawing or indorsing a bill of exchange, before the execution of his assignment, or incurred by him in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment. At any time after one year has elapsed, since the recording of the discharge, and the petition, affidavits, orders, schedule and other papers upon which the discharge was granted, as prescribed in section two thousand one hundred and eighty-one of this act, the petitioner may apply, upon proof of his discharge, to the court in which a judgment shall have been rendered against him, for an order directing the judgment to be canceled and discharged of record. If it appears that he has been discharged from the payment of that judgment, an order must be made accordingly, and thereupon the clerk must cancel and discharge the docket thereof, as if the proper satisfaction-piece of the judgment was filed. Notice of the application, accompanied with copies of the papers upon which it is made, must be given to the judgment creditor, unless his written consent to the granting of the order, with satisfactory proof of the execution thereof, and if he is not the party in whose favor the judgment was rendered, that he is the owner thereof, is presented to the court upon the application.

The discharge exonerates the insolvent from all liabilities incurred by him by making or indorsing any promissory note previous to the execution of the assignment, or incurred by him in consequence of the payment by any party to such note or bill, of the whole or any part of the money secured thereby, whether such payment be made prior or subsequent to the execution of the assignment by such insolvent. *Ford v. Andrews*, 9 Wend. 312. The debts of the insolvent on contract are discharged even though the creditor be a non-resident and did not unite in the petition nor accept a dividend, where the contract was made in this State, or where the contract was to be executed in this State, or where the creditor was, at the time of the first publication of notice, a resident of this State. The creditor is also bound in case he united in the petition or accepted a dividend, if the proceedings are valid, even if a non-resident. *Parkinson v. Scoville*, 19 Wend. 150; *Van Hook v. Whitlock*, 7 Paige, 373.

But where the contract was to be performed out of the State and the creditor is a non-resident and takes no part in the proceedings the discharge is inoperative. *Soule v. Chase*, 39 N. Y. 342; *Donnelly v. Corbett*, 3 Seld. 500. As between citizens of the same State the discharge is valid. But the discharge will not exonerate the debtor from liability upon a contract made in another State

between parties not inhabitants of this State at the time the contract was made, although previous to presenting the petition they became such inhabitants. A discharge obtained in this State is no defense to an action by a citizen of another State upon a note given before the proceedings for a discharge, although such note is made payable and the action is brought in this State. *Pratt v. Chase*, 44 N. Y. 597. This rule is applicable, though the debt due is a judgment which was recovered within the State where the discharge was obtained. *Leester v. Christalar*, 1 Daly, 29. The effect of the discharge upon negotiable paper is to destroy its negotiability, it discharges the debt for which the note was given, the note becomes worthless, and the person to whom it is transferred, after the discharge, acquires no right to maintain an action upon it. *De Puy v. Swartz*, 3 Wend. 135; *Moore v. Viele*, 4 id. 420; *Ocean National Bank v. Olcott*, 46 N. Y. 12. The discharge operates also to discharge a previously existing judgment obtained against the debtor even though judgment was obtained for a tort. It extinguishes the judgment as effectually as if it had been paid or released. *Smith v. Bennett*, 17 Wend. 479; *Luther v. Deyo*, id. 629; *Hayden v. Palmer*, 24 id. 364; *Deyo v. Van Valkenburgh*, 5 Hill, 242. But where judgment was not entered in such an action before discharge, the discharge does not protect the debtor. *Hodges v. Chase*, 2 Wend. 248; *Matter of Pis*, 10 Abb. 409. If the judgment was, however, entered, after discharge on verdict in an action on contract, the discharge protects the debtor. *Baker v. Taylor*, 1 Cow. 165. It is said the discharge of one of two joint debtors, before payment by his co debtor, will not affect the claim of the co-debtor for contribution against the discharged debtor toward the payment of the debt by the other, made subsequent to the insolvent assignment. *Ransom v. Keyes*, 9 Cow. 128; *Ellsworth v. Caldwell*, 27 How. 188; *Ellsworth v. Caldwell*, 48 N. Y. 680. It was held, where the creditor unites with one or two joint debtors for a discharge, the granting of the discharge releases the other joint debtor. *Alger v. Raymond*, 25 How. 593. As to this, see section 2156. The discharge is not conclusive as to the facts requisite to give the court jurisdiction. *Stanton v. Ellis*, 12 N. Y. 575; *Barber v. Winslow*, 12 Wend. 102; *Hale v. Sweet*, 40 N. Y. 97; *Rusher v. Sherman*, 28 Barb. 416; *People v. Stryker*, 24 id. 649; *Salters v. Tobias*, 3 Paige, 338; *Rockwell v. Brown*, 42 How. 226. These cases hold the recitals in the discharge are *prima facie* evidence only of jurisdictional facts, although conclusive evidence as to all facts and proceedings not jurisdictional. After discharge has

been granted, if the officer has acquired jurisdiction it is conclusive in all other proceedings in which it comes in question, and no objections, except such as go to the jurisdiction, can be availed of in a collateral proceeding; the remedy is by direct review or by *certiorari*. The jurisdictional facts are those necessary to be stated in the original papers, upon which the order to show cause is founded, and irregularities in subsequent proceedings are cured by discharge when attacked collaterally. *Stanton v. Ellis*, 16 Barb. 317; *Matter of Underwood*, 3 Cow. 59; 12 N. Y. and 28 Barb., *supra*. The defects and omissions in a discharge may be remedied by the introduction of proof outside the record. *Salters v. Tobias*, 3 Paige, 338; *Rusher v. Sherman*, 28 Barb. 416. It will not be presumed that an act required to be done was not performed because the recital is omitted from the discharge. *Rosevelt v. Kellogg*, 20 Johns. 211; *Salters v. Tobias*, 3 Paige, 338. To entitle an order of discharge to be put in evidence it is not sufficient that it shows general jurisdiction of the subject-matter, but that jurisdiction of the person and of the especial case was acquired by taking the necessary steps prescribed by statute to that end, and if the record fails in any of these particulars the fact must be proved *aliunde*. *Sellick v. Keeler*, 1 State Rep. 594.

§ 2183. In either of the following cases, such a discharge does not affect a debt or liability, founded upon a contract, unless it was owing when the petition was presented, to a resident of the State; or the creditor has executed a consent to the discharge; or has appeared in the proceedings; or has received a dividend from the trustee:

1. Where the contract was made with a person, not a resident of the State.
2. Where it was made and to be performed without the State.
3. Where the creditor was not, at the time of the discharge, a resident of the State.

The revisers held the following propositions settled, and cited the authorities named in their support, and endeavored to conform the section to those principles. No better interpretation of its meaning or citation of authorities bearing on the point seems possible.

"Since the enactment of the Revised Statutes most of the questions that can arise upon the subject have been authoritatively settled by the decisions of the Supreme Court of the United States, or by the Court of Appeals of this State, under which it is certain that the effect of the discharge under the laws of a State is too broadly stated in our present statute. It seems settled:

"*First*. That, unless the creditor has united in the application for the discharge, or has appeared in the proceedings in insolvency, or has received a dividend from the insolvent estate (*Clay v. Smith*,

3 Pet. 411), a discharge under a State insolvent law does not extinguish a debt which was either contracted before the passage of such a law (*Farmers and Mechanics' Bank v. Smith*, 6 Wheat. 131; *Ogden v. Saunders*, 12 id. 213); or

"(b) Contracted with a citizen of another State or country (*Ogden v. Saunders*, 12 Wheat. 213; *Cook v. Moffat*, 5 How. [U. S.] 295; *Soule v. Chase*, 39 N. Y. 342; *Hicks v. Hotchkiss*, 7 Johns. Ch. 297; *Van Hook v. Whitlock*, 26 Wend. 43; *Donnelly v. Corbett*, 7 N. Y. 500); or

"(c) Founded upon a contract made and to be performed without the State (*Suydam v. Broadnax*, 14 Pet. 67; *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153; *Towne v. Smith*, 1 Woodb. & M. 115; *Byrd v. Badger*, 1 McAll. 263); or,

"(d) Due to a creditor who, at the time of the discharge, is a citizen of another State or country. *Sturges v. Crowninshield*, 4 Wheat. 122; *Baldwin v. Hale*, 1 Wall. 223; *Baldwin v. Bank of Newberry*, id. 234; *Gilman v. Lockwood*, 4 id. 409.

"*Second.* That it makes no difference, in the application of the foregoing principles, that the creditor resorts to the courts of the State in which the discharge was granted, for the collection of his debt. *Donnelly v. Corbett*, 7 N. Y. 500; *Soule v. Chase*, 39 id. 342.

"We have endeavored to conform the section to the principles of these decisions. It may be doubted whether that section is not, even now, too broad, in subjecting to the operation of our insolvent laws a contract between citizens of the State, unless it was both made and to be performed without the State. But that question is not yet decisively settled, and, in a doubtful case, it is proper for us to incline to the validity of our present statutes, and the jurisdiction of our own courts."

§ 2184. Such a discharge does not affect:

1. A debt or duty to the United States; or
2. A debt or duty to the State, for taxes or for money received or collected by any person as a public officer, or in a fiduciary capacity, or a cause of action specified in section one thousand nine hundred and sixty-nine of this act, or a judgment recovered upon such a cause of action.

Except as prescribed in this section, the discharge exonerates the petitioner from a debt or other liability to the State, in like manner and to the same extent, as from a debt or liability to an individual.

§ 2185. If, at the time when the discharge is granted, the petitioner is under arrest, by virtue of an execution against his person issued, or an order of arrest made, in an action or special proceeding, founded upon a debt or liability from which he is discharged, as prescribed in the foregoing sections of this article, he must be released from the arrest, upon producing to the officer his discharge, or a certified copy of the record thereof. If the adverse party wishes to test the validity

of the discharge, he may procure a new order of arrest, or cause a new execution to be issued, as the case requires.

The following decisions were made under the Revised Statutes: If a discharge is granted after judgment, as the debtor in such case has had no opportunity to plead the discharge, he will be released on motion, and a perpetual stay of proceedings granted as to the judgment. The execution will be set aside even though the creditor may impeach the judgment for fraud, yet he cannot disregard the discharge and issue execution and sustain it on the ground of fraud, and a levy will not be allowed to be sustained as security except where facts were presented showing the discharge presumptively fraudulent. *Parkinson v. Scoville*, 19 Wend. 150; *Dresser v. Shufeldt*, 7 How. 85; *Smith v. Pell*, 20 id. 97; *Rich v. Salinger*, 11 Abb. 344; *Stewart v. Sohlinger*, 14 id. 291; 10 id. 258; *Russell & Hall v. Packard*, 9 Wend. 431; *Reed v. Gordon*, 1 Cow. 50; *Noble v. Johnson*, 9 Johns. 259; 1 Caines, 249; *Baker v. Taylor*, 1 Cow. 165; *Cramer v. Blank*, 3 Sandf. 700. The discharge must be pleaded. *Cornell v. Dakin*, 38 N. Y. 253. And where the defendant has been guilty of laches or fraud, or neglected to plead when he had the opportunity, leave to plead will not be granted on application. *Holyoke v. Adams*, 59 N. Y. 233; *Medbury v. Swan*, 46 id. 200; *Barstow v. Hanson*, 2 Hun, 333; *Price v. Peters*, 15 Abb. 197; *Stewart v. Green*, 11 Paige, 535; *Rudge v. Rundle*, 1 T. & C. 649. But if the discharge comes too late to be pleaded, the debtor will be relieved on motion. *Dresser v. Brooks*, 3 Barb. 429; *Baker v. Judges of Ulster*, 4 Johns. 191. If the discharge is obtained after judgment the debtor should move for perpetual stay of execution. *Dresser v. Shufeldt*, 7 How. 85; *Mather v. Bush*, 16 Johns. 233; *Clark v. Rowling*, 3 Comst. 216. The discharge will not, on such motion, be set aside on affidavits. *Deyo v. Van Valkenburgh*, 5 Hill, 245; *Rich v. Salinger*, 11 Abb. 344. A reference may be ordered to test the validity of the discharge. *Stewart v. Sohlinger*, 14 Abb. 291.

§ 2186. A discharge, granted as prescribed in this article, is void, in either of the following cases:

1. Where the petitioner willfully swears falsely, in the affidavit annexed to his petition or schedule, or upon his examination, in relation to any material fact, concerning his property or his debts, or to any other material fact.

2. Where, after presenting his petition, he sells, or in any way transfers or assigns any of his property, or collects any debt or demand owing to him, and does not give a just and true account thereof, upon the hearing or trial, and does not pay the money so collected, or the value of the property so sold, transferred, or assigned, as prescribed in this article.

3. Where he secretes any part of his property, or a book, voucher, or paper relating thereto, with intent to defraud his creditors.

4. Where he fraudulently conceals the name of any creditor, or the sum owing to any creditor, or fraudulently misstates such a sum.

5. Where, in order to obtain his discharge, he procures any person to become a consenting creditor, for a sum not due from him to that person in good faith, or for a sum greater than that for which the holder of a demand, purchased or assigned, is deemed a creditor, as prescribed in this article.

6. Where he pays, or consents to the payment of, any portion of the debt or demand of a creditor, or grants or consents to the granting of any gift or reward to a creditor, upon an express or implied contract, trust, or understanding, that the creditor so paid or rewarded should be a consenting creditor, or should abstain or desist from opposing the discharge.

7. Where he is guilty of any fraud whatsoever, contrary to the true intent of this article.

The cases of *Rockwell v. Brown*, 54 N. Y. 210, and *Rockwell v. McGovern*, 69 id. 294, should be considered together in arriving at effect of insolvency proceedings. They seem to arise out of the same proceeding. In the first case it is held that "a deed, executed by a party in whom title is vested, and expressing a valuable consideration, never need, against him or those claiming under him, or as against a stranger, to be supported, by showing what other reasons beside the will of the party led to its execution. Insolvent and other similar proceedings only need to be shown in order to give effect to deeds given by persons in whom the title is not vested, and who derive their power to convey from the statute and proceedings under which they are acting. These principles, so obvious in their reason, have been long established, and have never been held as not in conformity with the statute." In the second case it was held that the grant failed with the other proceedings, and did not divest the insolvent of his title to his estate, citing *Ely v. Cooke*, 28 N. Y. 374. It is further held that the proceedings, having been without jurisdiction, no lawful discharge of the debtor from his debts could be granted under them. The purpose of the assignment failed, as also the consideration upon which it was founded.

It will thus be seen that the deed of the assignee conveys the debtor's title, provided the proceedings are not attacked and shown to be invalid, but that, in case the proceedings under the act are void, the assignment and conveyances under it are ineffectual. The statute is held to be special and strictly construed. Adjudications involving the principle are numerous, citing *Onderdonk v. Voorhees*, 36 N. Y. 358; *Baily v. Burton*, 8 Wend. 339; *Games v. Stiles*, 14 Pet. 322. In opinion of Reynolds, J., in 54 N. Y. 210, *supra*, it is further held that the assignee in the proceedings established a *prima*

facie title to the premises, and it should have been received in evidence. In the later case (69 N. Y. 294, *supra*), it is said that this holding is not in conflict with the views there set forth, as it did not appear on the offer of the deed that the proceedings under which it was granted were void, and it is in the later case laid down as the correct rule that the assignment cannot be regarded as valid as a conveyance of the debtor's estate when the preliminary proceedings upon which it is based are void. The specification in the statute that certain acts and omissions shall vitiate the discharge implies that the decision of the judge is conclusive as to others. The fact that the true cause of indebtedness to the principal debtor was not set forth in the schedule, that the general ground of the indebtedness was omitted, and that no certificate of the recording of the assignment was presented to the judge, are not errors for which a discharge should be interfered with on *certiorari*. *People v. Stryker*, 24 Barb. 649. The mere omission of a creditor's name in the schedule, or a misstatement of the amount due, if not made with a fraudulent intent, will not invalidate the discharge. *Small v. Graves*, 7 Barb. 576. Where the schedule shows on its face that the creditors joining do not own two-thirds of the debts owing by the insolvent to creditors residing in the United States, the officer acquires no jurisdiction, and a discharge based on the petition is void. *Morrow v. Freeman*, 61 N. Y. 515. The seventh subdivision is construed in *Devlin v. Cooper*, 84 N. Y. 410, to mean that the fraud that renders a discharge void under the statutory provision referred to is one done in the proceedings under the statute to obtain a discharge, and not a fraud that has gone before, and in which the making of the debt was involved.

§ 2187. Where a person, who has been discharged as prescribed in this article, is afterward arrested by virtue of an order of arrest made, or an execution issued, in an action founded upon a debt or liability from which he is so discharged, the adverse party may oppose his application to be released from the arrest, by proof, by affidavit, of any cause for avoiding the discharge, for want of jurisdiction, or as specified in the last section. If such a cause is established, the application must be denied.

It seems that one not a creditor, and who has no interest to be affected by the discharge, cannot have a *certiorari* to vacate it. *People v. Stryker*, 24 Barb. 649. Objections other than those relating to the jurisdiction cannot, after discharge, be raised collaterally, but must be reviewed directly. *Rusher v. Sherman*, 28 Barb. 416; *People v. Schell*, 5 Lans. 332; *Soule v. Chase*, 39 N. Y. 342.

Amendments.—The proceedings are not amendable as to mat-

ters which go to the jurisdiction. *Small v. Wheaton*, 2 Abb. 175. But as to other matters an amendment may be allowed, as, for instance, that the schedule did not show the consideration for debts owing by the insolvent. *Matter of Hurst*, 7 Wend. 239; *Matter of Rosenberg*, 10 Abb. (N. S.) 450; *People v. Stryker*, 24 Barb. 649; *Soule v. Chase*, 1 Abb. (N. S.) 48; *Stanton v. Ellis*, 16 Barb. 319; *Brodie v. Stephens*, 2 Johns. 289; *Morewood v. Hollister*, 6 N. Y. 309.

Appeal.—The remedy, by way of review, was formerly by writ of *certiorari* under the statute, on allowance by a justice of the Supreme Court; under it the court was not limited in the examination to the questions of jurisdiction of the officer and the regularity of the proceeding, but might examine and correct any erroneous decision of the officers upon a question of law. *Morewood v. Hollister*, 6 N. Y. 309. This provision of the statute was repealed, and not re-enacted in the Code, and under the provisions of section 2121, with reference to *certiorari*, the writ cannot now issue to review the determination of a court in a special proceeding. The remedy is, therefore, by appeal, which goes to the General Term as from other adjudications in special proceedings.

CHAPTER IX.

EXEMPTION FROM ARREST OR DISCHARGE FROM IMPRISONMENT OF AN INSOLVENT DEBTOR.

The form of procedure under this article of the Code is, by the express enactment of several separate sections, conformed so closely to that of the previous article, that it is not deemed necessary to give precedents for the different forms required, as very slight adaptation of those under the previous article will accomplish the purposes of the act. In addition to this, the proceedings are so seldom had that a set of forms would be of little practical use to the profession. This article includes a debtor who has been charged in execution. *Devlin v. Cooper*, 84 N. Y. 410.

§ 2188. An insolvent debtor may be exempted from arrest, or discharged from imprisonment, as prescribed in this article. For that purpose, he must apply, by petition, to the County Court of the county in which he resides, or is imprisoned; or, if he resides or is imprisoned in the city of New York, to the Court of Common Pleas for that city and county. A person, who has been admitted to the jail liberties, is deemed to be imprisoned, within the meaning of this article.

An insolvent debtor imprisoned in a civil action, upon complying with section 2188, *et seq.*, is entitled to be discharged from imprisonment; where the money used was not that of the debtor, but of plaintiff, it seems if the debtor disposed of it for his own benefit or that of his family, he cannot be discharged. The burden of proving such a disposition of the property is on the creditor. *In re Caamano*, 8 Civ. Pro. 29.

§ 2189. The petition must be in writing; it must be signed by the insolvent, and specify his residence, and also, if he is in prison, the county in which he is imprisoned, and the cause of his imprisonment. It must set forth, in substance, that he is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of this article, for the purpose of being exempted from arrest and imprisonment, as prescribed therein; and it must pray, that upon his so doing, he may thereafter be exempted from arrest, by reason of a debt, arising upon a contract previously made; and also, if he is imprisoned, that he may be discharged from his imprisonment. It must be verified by the affidavit of the insolvent, annexed thereto, taken on the day of the presentation thereof, to the effect, that the petition is in all respects true in matter of fact.

The presentation of the petition and schedule of an imprisoned debtor duly verified confers jurisdiction. It is said the order to show cause is an incident, but not necessary to jurisdiction. A notice which apprises the creditors of the debtor's intention to ask that he may assign his estate for the benefit of his creditors, and be discharged from imprisonment, is a proper notice to them to show cause why the prayer of the petitioner should not be granted. *Matter of Jacobs*, 12 Abb. (N. S.) 273. Three things are necessary to give a judge jurisdiction to discharge a debtor from imprisonment: 1. Power to act on the general subject-matter, that is, authority under the statute. 2. Jurisdiction of the person of the insolvent who must reside or be imprisoned in the county. 3. Jurisdiction of the particular case by proper averments. *Devlin v. Cooper*, 84 N. Y. 410. The verified petition is sufficient proof of residence, or proof may be made by affidavit of another than the debtor. *Id.*

Precedent for Petition.

To the County Court of the County of Ulster:

The petition of Abram Doyle respectfully shows that your petitioner resides at 45 Liberty street, at the city of Kingston, in the county of Ulster.

That he is an insolvent debtor, and is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of article 2 of title 1 of chapter 17 of the Code of Civil Procedure, for

the purpose of being exempted from arrest and imprisonment as prescribed therein.

Wherefore your petitioner prays that upon his so doing, he may thereafter be exempted from arrest by reason of any debt arising upon a contract previously made, and have such other relief as he may be entitled to pursuant to said article.

(Add verification.)

(Signature.)

§ 2190. The petitioner must annex to his petition, a schedule, in all respects similar to that required of an insolvent, as prescribed in section two thousand one hundred and sixty-two of this act.

For form of schedule, see form under section 2162.

§ 2191. An affidavit, in the following form, subscribed and taken by the petitioner before the county judge, or, in the city of New York, before the judge holding the term of the court at which the order specified in the next section is made, must be annexed to the schedule:

"I, ———, do swear" (or "affirm," as the case may be,) "that the matters of fact, stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, at any time, or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view that they or any of them should abstain from opposing my discharge."

§ 2192. The petition, and the papers annexed thereto, must be presented to the court, and filed with the clerk. The court must thereupon make an order, requiring all the creditors of the petitioner to show cause before it, at a time and place therein specified, why the prayer of the petitioner should not be granted; and directing that the order be published and served, in the manner prescribed in section two thousand one hundred and sixty-five of this act, for the publication and service of an order, made as therein prescribed.

Service of a notice without signature, of an order requiring creditors to show cause why a discharge should not be granted, which notice states an order made by another officer than the one before whom the proceedings were pending, was held insufficient, and the defect not cured by discharge. *People v. Gray*, 19 How. 238. An order to show cause before one of the judges of the Court of Common Pleas, in and for the city of New York, naming him, is a sufficient compliance with the statute as to specifying the place of return. *Matter of Jacobs*, 12 Abb. (N. S.) 273. Upon an application by an insolvent and imprisoned debtor to be discharged from imprisonment, the notice required by statute was by the order made, directed to be published in two papers, named, and was required to be given for a certain day, at an hour named. In one of the papers, it was for a different day, three days distant. *Held*, that the officer had no right to grant the discharge. *People v. Daly*, 4

Hun, 641. To confer jurisdiction to grant a discharge, a publication of notice as required by statute is indispensable. *Dieckenhoffer v. Ahlborn*, 2 Abb. N. C. 372.

Order to Show Cause.

At a term of the Ulster County Court held at the chambers of the judge in the city of Kingston, Ulster county, N. Y., August 18, 1882:

Present — Hon. William Lawton, *County Judge of Ulster County.*

In the Matter of the Application of
Abram Doyle, an Insolvent Debtor,
for exemption from arrest.

On reading and filing the petition of Abram Doyle, an insolvent debtor for exemption from arrest, verified this 20th day of March, 1882, with the schedule and affidavit thereto annexed, of Abram Doyle, verified before the above-named William Lawton the 16th day of July, 1882, and on motion of William T. Holt, attorney for said petitioner,

Ordered, that all the creditors of said Abram Doyle show cause before this court at a term thereof to be held at the court-house in the city of Kingston on the 23d day of September, 1882, at ten o'clock in the forenoon, why the prayer of the said petitioner, Abram Doyle, should not be granted.

That the petitioner also caused to be served upon each creditor of said Abram Doyle, residing within the United States, whose place of residence is known to him, a copy of this order, either personally at least twenty days before the said 23d day of September, 1882, or by depositing it at least forty days before that day in the post-office, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.

WILLIAM LAWTON,
County Judge of Ulster County.

§ 2193. The provisions of sections two thousand one hundred and sixty-six, two thousand one hundred and sixty-seven, two thousand one hundred and sixty-eight, two thousand one hundred and sixty-nine, two thousand one hundred and seventy, two thousand one hundred and seventy-two, and two thousand one hundred and seventy-three of this act, apply to a special proceeding, taken as prescribed in this article.

§ 2194. An order, directing the execution of an assignment, must be made by the court, where it appears, by the verdict of the jury, or, if a jury has not been demanded, or the jurors have been discharged by reason of their inability to agree, where it satisfactorily appears to the court, as follows:

1. That the petitioner is unable to pay his debts.
2. That the schedule annexed to his petition is true.
3. That he has not been guilty of any fraud or concealment, in violation of the provisions of this article.
4. That he has, in all things, conformed to the matters required of him by this article.

EXEMPTION FROM ARREST, ETC., OF INSOLVENT DEBTOR. 201

The provisions of sections two thousand one hundred and seventy-five, two thousand one hundred and seventy-six, and two thousand one hundred and seventy-seven of this act apply to the order prescribed in this section, and to the assignment made in pursuance thereof, except that the trustee or trustees must be nominated, as well as appointed, by the court.

For form of assignment, see form under section 2175.

§ 2195. Upon the production, by the petitioner, of the certificates of the trustee or trustees, and the county clerk, to the effect prescribed in section two thousand one hundred and seventy-eight of this act, the court must grant to the petitioner a discharge, declaring that the petitioner is forever thereafter exempted from arrest or imprisonment, by reason of any debt due at the time of making the assignment, or contracted before that time, though payable afterward; or by reason of any liability incurred by him, by making or indorsing a promissory note, or by accepting, drawing, or indorsing a bill of exchange, before the execution of the assignment; or in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment, with the exceptions specified in section two thousand two hundred and eighteen of this act. The discharge shall have the effect therein declared, as prescribed in this section.

Where a debtor makes an application to be exempt from arrest or imprisonment by reason of any debts arising upon contract previously made, viz.: money collected in a fiduciary capacity, and it appears that within one year previous to such application he has given a chattel mortgage to secure an antecedent debt, knowing of his insolvency, it was held that the discharge must be denied. *Matter of Mower*, 1 Law Bull. 39. An insolvent is not entitled to his discharge from an indebtedness which arose from his embezzlement of money, and evidences of debt which came into his possession as clerk in the course of his employment as such, but the mere statement in the petition that the demand arose when he was clerk of the creditors, for money which he had in his possession and did not account for, and appropriated to his own use, is not sufficient ground for denying the discharge. *Matter of Pie*, 10 Abb. 409. The provision only relates to claims on contract. *Grocers' Nat'l Bank v. Clark*, 31 How. 115. Giving preferences to creditors previous to an assignment is no answer to a plea of discharge. *Hayden v. Palmer*, 24 Wend. 364. But to the contrary, the later case of *People v. O'Brien*, 3 Abb. Dec. 552. An insolvent's discharge, which stated "that the said insolvent has conformed in all things to those matters required of him by the statute, held to be a sufficient recital of all jurisdictional facts. *Pratt v. Chase*, 29 How. 296. The discharge under the statute applies to judgments in actions for torts as well as on contract, but to have such effect judgment must have been entered on the verdict at the time of the discharge. *Hay-*

den v. Palmer, 24 Wend. 364; *Luther v. Deyo*, 19 id. 629; *Ex parte Thayer*, 4 Cow. 66; *People v. Marine Court*, 3 id. 366; *Grocers' Bank v. Clark*, 31 How. 115. For form of discharge, see form under section 2178. An order to discharge an insolvent debtor must be made by the court. *Hayes v. Bowe*, 65 How. 347. Where the order of discharge contains recitals of all jurisdictional facts it protects the sheriff. *Devlin v. Cooper*, 84 N. Y. 410.

§ 2196. The provisions of section two thousand one hundred and eighty-one of this act apply to the discharge, and to the petition and other papers upon which it was granted.

§ 2197. If, at the time when the discharge is granted, the petitioner is imprisoned, by virtue of an execution against his person issued, or of an order of arrest made, in an action or special proceeding founded upon a debt, liability, or judgment, as to which he is exempted from arrest or imprisonment, as prescribed in the last section but one, the officer must forthwith release him, on production of the discharge, or a certified copy of the record thereof.

If the insolvent be in prison in any suit or proceeding founded on any contract or liability as to which he is exempted from imprisonment by reason of his discharge, granted under the statute, he must be released on producing his discharge. *Hayden v. Palmer*, 24 Wend. 364.

§ 2198. A debt, demand, judgment, or decree, against an insolvent, discharged as prescribed in this article, is not affected or impaired by the discharge; but it remains valid and effectual, against all his property, acquired after the execution of the assignment. The lien, acquired by or under a judgment or decree, upon any property of the insolvent, is not affected by the discharge.

§ 2199. A discharge, granted to an insolvent as prescribed in this article, is void, in the same cases, so far as they are applicable, in which a discharge, granted as prescribed in article first of this title, is therein declared to be void; and the validity of such a discharge may be tested in the same manner.

CHAPTER X.

DISCHARGE OF AN IMPRISONED DEBTOR FROM IMPRISONMENT.

§ 2200. A person, imprisoned by virtue of an execution to collect a sum of money, issued in a civil action or special proceeding, may be discharged from the imprisonment, as prescribed in this article. A person who has been admitted to the jail liberties, is deemed to be imprisoned, within the meaning of this article.

An infant is entitled to his discharge from imprisonment on complying with the terms of the statute. The prisoner's act in making an assignment will be regarded as valid notwithstanding his infancy. *People v. Mulkin*, 25 Wend. 698. A prisoner will not be dis-

charged where he is imprisoned for non-payment of a fine imposed for a contempt of court for the non-performance of some act or duty which it is within his power to perform. *Spaulding v. People*, 7 Hill, 301; affirmed, 10 Paige, 301; *Van Wezel v. Van Wezel*, 3 id. 38; *Patrick v. Warner*, 4 id. 398. A person committed for non-payment of alimony is entitled to his discharge. *People v. Cowles*, 4 Keyes, 38. But a prisoner will not be discharged who is in custody of the sheriff under an attachment to bring him into court to answer interrogatories in a proceeding for contempt. Such a discharge is premature till after conviction. *Jackson v. Smith*, 5 Johns. 115; *Bissell v. Kip*, id. 89. In *Patrick v. Warner*, 4 Paige, 397, it is questioned whether a person imprisoned for costs of a proceeding, as for a contempt to enforce a civil remedy, is entitled to his discharge. If the judgment exceeds \$500, and the defendant has been imprisoned less than three months, a discharge will be void if granted. *Browne v. Bradley*, 5 Abb. 141; *Matter of Rosenberg*, 10 Abb. (N. S.) 450; *Dusart v. Delacroix*, 1 Abb. (N. S.) 409n. It was held under the former statute, that a person entitled to the jail limits was entitled to apply for a discharge as well as one in close custody. *Holmes v. Lansing*, 3 Johns. Cas. 73; *Peters v. Henry*, 6 Johns. 121; *Coman v. Storm*, 26 How. 84. Although it was also held to the contrary, in *Bylandt v. Comstock*, 25 How. 429, the language of the present section determines the question, overruling the authorities to the contrary, it having been drafted by the codifiers with that view. The object of the statute is the discharge of honest debtors who make an honest and full surrender of all their property for their creditors. *Matter of Brady*, 69 N. Y. 215.

§ 2201. Application for such a discharge must be made by petition, addressed to the court from which the execution issued; or to the County Court of the county in which he is imprisoned; or, if he is imprisoned in the city of New York, to the Court of Common Pleas for that city and county.

An application for the discharge of an insolvent debtor may be made in the court out of which the execution issued. *Matter of Irving*, 3 How. (N. S.) 236. While the form of the petition is not prescribed by the statute, enough must appear upon the face of it to give the officer jurisdiction. All the facts to entitle the applicant to a discharge must appear, more particularly all jurisdictional facts. *Browne v. Bradley*, 5 Abb. 141; *People v. Brooks*, 40 How. 165. Where the petition showed that the judgment on which the petition was taken in execution exceeded \$600, but did not also show that he had been imprisoned three months, it was held on motion by the

plaintiff to issue a new execution against the body of the debtor, that the petition was defective, and the discharge granted upon it void for want of jurisdiction. *People v. Bancker*, 5 N. Y. 106. The omission of an account of the debtor's real and personal estate as it existed at the time of the arrest is not supplied by allegations in the petition, that prior to the rendition of the judgment the debtor was adjudged a bankrupt, and an assignee in bankruptcy appointed. *Bulymore v. Cooper*, 46 N. Y. 236. The mere fact that his imprisonment under the execution and order of arrest has continued for three months is not sufficient. *Dusart v. Delacroix*, 1 Abb. (N. S.) 409. Proof that the insolvent resided or was imprisoned in the county where the application was made was required as jurisdictional, under the Revised Statutes. *People v. Machado*, 14 Abb. 460. An insolvent debtor, whose petition for a discharge has been refused because his proceedings are adjudged to be not just and fair, in that he failed to include in his petition an account of some of his property, cannot be permitted to present a new petition, including such property, and stating no new facts to explain or justify his acts in his former proceeding, but he will be left to an application to reopen the former proceeding, upon proof of the good faith of the matters charged upon him in that proceeding. *Matter of Thomas*, 10 Abb. (N. S.) 114. A petition for the discharge of an imprisoned debtor sufficiently sets forth the cause of his imprisonment if it alleges that he is confined in the county jail by virtue of an execution against his person, issued in a civil action, brought by a person therein named. *Ex parte Chappell*, 23 Hun, 179. The application was required to be to the court under the Revised Statutes. *Mathews' Case*, 14 Abb. 115; *Matter of Walker*, 2 Duer, 655. The fact that the petition is addressed to the judge and not to the court does not invalidate the discharge. *Borthwick v. Howe*, 27 Hun, 505.

§ 2202. A person so imprisoned may apply for such a discharge, at any time; unless the sum, or, where he is imprisoned by virtue of two or more executions, the aggregate of the sums, for which he is imprisoned, exceeds five hundred dollars; in which case, he cannot present such a petition, until he has been imprisoned, by virtue of the execution or executions, for at least three months.

A discharge is void where the papers fail to show the debtor has been imprisoned for three months. *Browne v. Bradley*, 5 Abb. 141. An application for a discharge must show that the arrest is for over \$500, and that he has been imprisoned more than three months. An objection to the jurisdiction on this ground may be taken at any time. *Matter of Rosenberg*, 10 Abb. (N. S.) 450.

§ 2208. The petition must be in writing; it must be signed by the petitioner; and it must state the cause of his imprisonment by setting forth a copy, or the substance of the execution, or, if there are two or more executions, of each of them. The petitioner must annex thereto, and present therewith, a schedule, containing a just and true account of all his property, and of all charges affecting the same; as the property and charges existed at the time when he was first imprisoned, and also as they exist at the time when the petition is prepared; together with a just and true account of all deeds, securities, books, vouchers and papers relating to the property, and to the charges thereupon.

The statute is imperative that the papers presented to the court shall conform with exactness to its provisions. It is requisite to jurisdiction of a petition for a discharge that an account of the real and personal estate be given as it existed at the time of preparing the petition. This is to prevent payments and transfers of property to other creditors than the execution creditor during the time of the imprisonment. It must contain an account, as required by statute. A statement that the petitioner, prior to the rendition of the judgment on which he was arrested, was declared bankrupt, and an assignee of all his property appointed, in whom title has vested, does not supply the defect of an account of his property at the time he was arrested. No account or statement of creditors is required, since no creditors are interested in the proceeding except such as have the debtor on execution. *Bulymore v. Cooper*, 46 N. Y. 236; *People v. Bancker*, 5 id. 106; *People v. Brooks*, 40 How. 165; *Hall v. Kellogg*, 12 N. Y. 325. A petition on application to discharge from arrest one held under execution, in describing the judgment on which it issued, gave the name of but one of two plaintiffs, and but one of two defendants. It was held that the omission to name all the parties in the petition was not fatal to the validity of the discharge. *Goodwin v. Griffiths*, 88 N. Y. 629.

Form of Petition.

To the Supreme Court of the State of New York:

The petition of Stephen Harp, of the town of Hurley, county of Ulster, N. Y., respectfully shows to the court that the petitioner is a prisoner confined in the jail of the county of Ulster, on an execution against the person, issued out of this court, in a civil action, wherein Charles French is plaintiff and your petitioner is defendant; and in which action judgment was rendered against your petitioner for the sum of \$854.35, on the 23d day of June, 1884. That the said sum of \$854.35 is now due and unpaid on said execution, and that your petitioner has been imprisoned on said execution for more than three months.

And your petitioner further shows that hereto annexed, and marked as schedules "A" and "B," is a just and true account of all his estate, real and personal, in law and equity, and of all charges affecting the

same, both as such estate and charges existed at the time of preparing the petition, together with a just and true account of all deeds, securities, books and writings whatsoever relating to the said estate and the charges thereon, with the names and places of abode of the witnesses to such deeds, securities and writings.

Your petitioner therefore prays the order of this court, directing the sheriff of said county to bring your petitioner into this court on a day assigned for that purpose, that your petitioner may be discharged from his said imprisonment on his compliance with the provisions of the Code of Civil Procedure; and that your petitioner may have such further or other relief as he may be entitled to under the provisions of the statute authorizing debtors imprisoned on execution in civil causes to be discharged from imprisonment.

Dated *January 1, 1885.*

(*Signature.*)

§ 2204. An affidavit, in the following form, subscribed and taken by the petitioner, on the day of the presentation of the petition, must be annexed to the petition and schedule:

"I, ———, do swear" (or "affirm," as the case may be,) "that the matters of fact, stated in the petition and schedule hereto annexed, are, in all respects, just and true; and that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, with intent to injure or defraud any of my creditors."

The court does not obtain jurisdiction to discharge the prisoner unless he verifies the petition at the time he presents it, and the affidavit is a prerequisite to jurisdiction. *Browne v. Bradley*, 5 Abb. 141; *Bullymore v. Cooper*, 2 Lans. 71; affirmed, 46 N. Y. 236. See *Hillyer v. Rosenbery*, 11 Abb. (N. S.) 402. The affidavit under the Revised Statutes was not required to be indorsed and sworn to in presence of the court, but at time of its presentation, it must have been sworn to by the applicant. *Richmond v. Prait*, 24 Hun, 578. It is held in *Schaeffer v. Risely*, 6 State Rep. 417, that the affidavit must be made on the day of the presentation of the petition and not previously, and it is intimated that no copy of affidavit need be served. This necessarily follows if this rule is strictly followed, and it seems to be jurisdictional. Under the requirement of this section as to the affidavit, it is held in *Matter of Brown*, 39 Hun, 27, that if it be shown that the creditor was in any way defrauded or injured by the transaction alleged to be fraudulent, proof thereof may be given whether such transaction preceded or followed the recovery of the judgment by such creditor, or even the inception of the cause of action on which such judgment was recovered.

§ 2205. At least fourteen days before the petition is presented, the petitioner must serve, upon the creditor in each execution, by virtue of which he is impris-

oned, a copy of the petition, and of the schedule; together with a written notice of the time when, and place where, they will be presented. If, by reason of changes occurring after the service, it is necessary, before presenting the petition and schedule, to correct any statement contained in the schedule, the correction may be made by a supplemental schedule, a copy of which need not be served, unless the court so directs.

Notice of application was for a term to be held at the court-house; the order was at a term of court at office of county judge. *Held*, that it was to be presumed that such office was at the court-house, and that the order was made at a regular term of the court. *Goodwin v. Griffis*, 88 N. Y. 630. The same case holds that where one of plaintiffs signed an admission of service and he was sole owner of judgment, it was sufficient.

Form of Notice of Motion.

In the Matter of the Application of
Stephen Harp, an Insolvent Debtor,
to be discharged from imprisonment.

To HENRY G. WILLIAMS:

SIR — Please take notice, that I shall present to the Supreme Court, at the next Special Term thereof, to be held at the court-house at Kingston, in the said county of Ulster, on the 27th day of January, 1885, at ten o'clock in the forenoon on that day, or as soon thereafter as counsel can be heard, the petition together with the account annexed thereto, with copies whereof you are herewith served, and that I shall then and there apply to the said court that the prayer of said petition be granted.

(Dated.)

W. S. FREDENBURGH,
Attorney for Stephen Harp.

§ 2206. The papers, specified in the last section, may be served, either upon the creditor or his representative, or upon the attorney whose name is subscribed to the execution; and, in either case, in the manner prescribed in this act for the service of a paper upon an attorney, in an action in the Supreme Court. Where it is made to appear, by affidavit, to the satisfaction of the court, that service cannot, with due diligence, be so made within the State, upon either, the court may make an order, prescribing the mode of service, or directing the publication of a notice in lieu of service, in such a manner and for such a length of time, as it thinks proper; and thereupon it may direct an adjournment of the hearing to such a time as it thinks proper.

§ 2207. Where the State is a creditor, the papers must be served upon the attorney-general, who must represent the State in the proceedings.

§ 2208. Upon the presentation of the petition, schedule, and affidavit with due proof of service or publication, as prescribed in the last three sections, the court must make an order, directing the petitioner to be brought before it, on a day designated therein; and on that day, or on such other days as it appoints, the court must, in a summary way, hear the allegations and proofs of the parties.

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If the court is satisfied that the petition and schedule are correct, and that the petitioner's proceedings are just and fair, it must make an order, directing the petitioner to execute, to one or more trustees, designated in the order, an assignment of all his property, not expressly exempt by law from levy and sale by virtue of an execution; or of so much thereof as is sufficient to satisfy the execution or executions, by virtue of which he is imprisoned.

A judgment debtor is not entitled to his discharge where he has disposed of his property with intent to defraud the creditor at whose suit he is imprisoned. *Coffin v. Gourlay*, 9 Week. Dig. 498; S. C., 20 Hun, 408. It is enough to show that the proceedings on the part of the debtor were not "just and fair" if the creditor establishes upon the hearing that the debtor has disposed of or made over any part of his property with intent to injure or defraud any of his creditors, although such act was committed before the commencement of the action in which he is imprisoned, provided they are shown to be so far connected with the action as to be grounds for the order on which his imprisonment was based. The fraudulent disposition need not have been made with a view to his discharge. *Matter of Brady*, 69 N. Y. 215; affirmed, 8 Hun, 437. But what is required is that the proceedings of the debtor have been just and fair. With respect to the matters that he is required to swear to in the affidavit, there is nothing in the statute that would authorize holding that a debtor cannot be discharged because he has made a false and fraudulent representation as to the solvency of a person to whom credit was given by the person who has recovered a judgment for damages against the prisoner for the injury thus sustained. *Matter of Fowler*, 59 How. 148.

Still a discharge will be refused on the ground that a fraudulent mortgage of property was made before the commencement of the action, but in view of its commencement, though in no way connected with the subject of the action. *Gaul v. Clark*, 1 Week. Dig. 209. It was held that the "proceedings" referred to might be transactions prior to the application. *Matter of Watson*, 2 E. D. S. 429. Although the Marine Court seems to have held a different rule in *Sparks v. Andrews*, 7 Week. Dig. 276. See, also, *People v. White*, 14 How. 498, and *Matter of Finck*, 59 id. 145. In *Matter of Fowler*, 59 How. 148, it is held that the proceedings are by this section required to be just and fair in respect to the matters he is required to swear to in the petition, and that the affidavit means any disposition of his property made with intent to defraud existing creditors. In *Suydam v. Belknap*, 20 Hun, 87, the *Case of Brady*, 69 N. Y. 215, is distinguished. A debtor's proceedings are not just and fair

if he has procured by fraud property from the execution creditor, or aided others in so doing, but if he was innocent of the fraud, though legally liable for the debt, he may be discharged. It is not necessary, however, that he or his family should have been benefited, to bar a discharge, if the creditor was defrauded by his act. *Matter of Roberts*, 59 How. 136; *Matter of Finck*, id. 143; *Matter of Tomkins*, 3 Law Bull. 8. Where a defaulter could not account for property misappropriated, except as to a portion conveyed away, and not specified in his inventory, *held* he could not have the benefit of the act. *People v. White*, 14 How. 498. Where the petitioner, after imprisonment, filed a voluntary petition in bankruptcy, and, by virtue of it, assigned all his property to the assignee in bankruptcy, and then filed his petition for a discharge under this act, *held*, that such disposition of his property was a fraud on the act, and a ground for refusing the discharge. *People v. Brooks*, 40 How. 165; *Spear v. Wardwell*, 1 N. Y. 144; *Hall v. Kellogg*, 12 id. 325. But where the debtor was charged in execution, after petition filed in bankruptcy, it was held to be a valid disposition of his property, and no bar to his discharge. A creditor cannot contest the discharge who is in no way injured or defrauded. *Matter of Brady*, 69 N. Y. 215. Only existing creditors at the time can complain that the debtor at one time conveyed all his property with intent to defraud his creditors. The fraud which the bankrupt must be guilty of is not the fraud in contracting the debt or liability, but fraud in the subsequent disposition of his property to evade such liability. *In re Pearce*, 29 Hun, 270. The fact that the defendant converted funds received in a fiduciary capacity does not prevent his discharge, as it was not his own money. *Suydam v. Belknap*, 20 Hun, 87. But it was also held in *Matter of Tomkins*, 3 Law Bull. 8, that where a debtor seeks discharge from imprisonment on a judgment for money received in a fiduciary capacity, he must show what he has done with the money. Personal participation by the petitioner in a fraud perpetrated by a firm of which he was a member must be shown to justify the court in denying a discharge. A judgment that the firm has been guilty of a fraudulent disposition of its property does not necessarily preclude his discharge as one of the partners. *Matter of Benson*, 11 Week. Dig. 394. The General Term will not review the determination of the County Court, whether the schedules of the debtor are just and fair. *Richmond v. Prain*, 24 Hun, 578. A debtor has a right to

prefer any creditor, or defeat a preference to any creditor by a general assignment or other preference. It is sufficient if the intent be to pay honest debts. *In re Pearce*, 29 Hun, 270; *Roswoog v. Seymour*, 7 Robt. 429; *Corning v. White*, 2 Paige, 567. It is said a debtor is not entitled to his discharge if it appears he has been in the enjoyment of an income, and expended it in the support of his family without any effort to pay the judgment, and the circumstances are such that he might have set apart a portion of his income to apply on the judgment, for omitting to do so is not "just and fair." *Matter of Donoghue*, 17 Abb. N. C. 277. A debtor cannot be discharged who has disposed of his property to defraud creditors, whether it was before or after action in which he was arrested, but, to prevent a discharge, there must have been an intent to defraud existing creditors, of whom the creditor contesting the discharge must have been one. *In re Haight*, 11 Civ. Pro. 227. A judgment debtor imprisoned under a judgment for money obtained by him by fraud, who has used such money in maintaining himself and family, is deemed to have disposed of such money with intent to defraud the creditor, and cannot be discharged under section 2200, etc. Following *In re Finck*, 59 How. 145; *In re Roberts*, id. 136; *Matter of Lowell*, 8 Civ. Pro. 5.

Where the insolvent, just prior to a general assignment by his firm, permitted his wife to withdraw all his ready money in the firm on account of indebtedness to her, had collected firm moneys and applied to his own use, etc., it was held that his proceedings had not been just and fair, and his application for a discharge denied. *In re Hoves*, 9 Civ. Pro. 17. In an action against a sheriff for an escape, the defense was set up that the imprisoned debtor had been legally discharged, pursuant to the directions contained in Code of Civil Procedure, section 2212. *Held*, that the fact that the petition for the discharge was in writing, and that a schedule was annexed as required by Code of Civil Procedure, section 2203, being shown upon the trial, supplied the want of those allegations in the order of discharge. *Held*, that the affidavit required to be annexed to the petition and schedule by Code of Civil Procedure, section 2204, must be subscribed and taken, as therein provided, by the petitioner on the day of the presentation of the petition. *Held*, that an order for the discharge of an imprisoned debtor which did not recite the fact of an affidavit made and annexed, pursuant to the provisions of Code of Civil Procedure, section 2204, when, in fact, such affidavit was not made on the day therein specified, did not protect the

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officer making the discharge as directed. *Schaffer v. Risely*, 6 State Rep. 417.

§ 2209. Upon sufficient cause being shown by a creditor, the court may, from time to time, adjourn the hearing; but not to a day later than three months after the presentation of the petition.

Where the petitioners failed to appear on the day to which the hearing had been adjourned, and the proceedings were dismissed with leave to come in on terms, and the petitioner moved to open the default, it was held that the court had lost jurisdiction by the omission to adjourn the proceeding on the day assigned for the hearing. *Bylandt v. Comstock*, 25 How. 429. And when the proceedings were not adjourned to the next term, the adjournment of the court without day put an end to them. *People v. Brooks*, 40 How. 165.

§ 2210. An objection to a matter of form shall not be received upon an adjourned day; and, unless the opposing creditor satisfies the court that the proceedings on the part of the petitioner are not just and fair, the court must direct an assignment, as prescribed in the last section but one, and must grant a discharge, as prescribed in the following sections of this article.

For form for order, see precedent under section 2174.

§ 2211. The assignment must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county where the petitioner is imprisoned. Where it appears, from the schedule or otherwise, that real property will pass thereby, the assignment must also be recorded as a deed, in the proper office for recording deeds, of each county where the real property is situated. The assignment vests in the trustee or trustees, for the benefit of the judgment creditors in the executions, by virtue of which the petitioner is imprisoned, all the estate, right, title, and interest of the petitioner in and to the property so directed to be assigned.

The design of this section is to leave it to the sound discretion of the court whether to require any security, and, if any, then to fix the form of the security, and the amount according to the circumstances of each particular case. *Roswog v. Seymour*, 7 Robt. 429. The assignment must include all property which the debtor has at the time when it is ordered and made, and not merely such as he had at the time of filing the petition. *Borthwick v. Howe*, 27 Hun, 505.

Form of assignment as under section 2175. Form of certificate as under section 2178.

§ 2212. Upon the production, by the petitioner, of satisfactory evidence that the petitioner has actually delivered to the trustee or trustees all the property so directed to be assigned, which is capable of delivery; or upon the petitioners giving security, approved by the court, for the future delivery thereof; the court must make an order, discharging the petitioner from imprisonment, by virtue of each execution, specified in his petition. The sheriff, upon being served with a

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certified copy of the order, must discharge the petitioner as directed therein, without any detention on account of fees.

Form of order as under section 2178.

It was held *In re Von Schoening*, 1 Law Bull. 4, that the affidavit of the assignee that the property of the debtor had been delivered to him amounts to a certificate of that fact, and is sufficient. If the order is relied upon without proof *aliunde* of the facts needful for jurisdiction, the recitals should be full, but otherwise no recitals are absolutely necessary. It is valid if the facts exist which render it so, whether recited or not, but for the protection of the sheriff in discharging the prisoner, it should contain *prima facie* evidence of regularity of the proceedings, and show sufficient jurisdictional facts. *Bullymore v. Cooper*, 46 N. Y. 236; *Bennett v. Burch*, 1 Den. 141; *Devlin v. Cooper*, 84 N. Y. 410. If the order for discharge omits the recital of a material fact, the fact may be shown *aliunde*. *Goodwin v. Griffiths*, 88 N. Y. 630. The debtor must assign all the property he has at the time he is ordered to make the assignment, not what he had at time of making petition. There must be some good evidence of delivery of property to assignee to justify a discharge. *Borthwick v. Howe*, 27 Hun, 505.

§ 2213. Notwithstanding such a discharge, the judgment creditor in the execution has the same remedies, against the property of the petitioner, for any sum due upon his judgment, which he had before the execution was issued; but the petitioner shall not, except as is otherwise specially prescribed in the next section, be again imprisoned by virtue of an execution upon the same judgment, or arrested in an action thereupon.

§ 2214. If the petitioner is convicted of perjury, committed in any of the proceedings upon his petition, any judgment creditor, by virtue of whose execution he was imprisoned, may issue a new execution against his person.

§ 2215. The trustee must collect the demands, and sell the other property assigned to him. He must apply the proceeds thereof, after deducting his commissions and expenses allowed by law, as follows:

1. To the payment of the jail fees, upon the imprisonment and discharge of the petitioner.

2. If any surplus remains, to the payment of the creditors, by virtue of whose executions the petitioner was imprisoned, when he presented his petition; or, if there is not enough to pay them in full, to the payment, to each, of a proportionate part of the sum due upon his execution.

3. If any surplus remains, he must pay it over to the petitioner, or his executor or administrator.

Personal service upon a creditor, or his attorney, of written notice of the time and place of making a distribution, as prescribed in subdivision second of this section, has the same effect as publishing a notice thereof, in a case prescribed by law.

§ 2216. Where a person has been imprisoned, by virtue of an execution, for the space of three months after he was entitled, by the provisions of this article, to

apply for a discharge; and has neither made such an application, nor applied for his discharge under the provisions of article first of this title; the judgment creditor, by virtue of whose execution he is imprisoned, may serve upon the prisoner a written notice, requiring him to apply for his discharge, according to the provisions of this article.

§ 2217. If the prisoner does not, within thirty days after personal service of such a notice, either present a petition to the proper court, as prescribed in article first of this title, or serve, upon the creditor giving the notice, a copy of a petition and schedule, with a notice of his intention to apply for his discharge, as prescribed in this article; or if, after such a presentation or service, he does not diligently proceed thereupon to a decision, he shall be forever barred from obtaining his discharge under the provisions of this article, or of article first of this title.

§ 2218. Neither of the following named persons shall be discharged from imprisonment, under the provisions of this article:

1. A person owing a debt or duty to the United States.
2. A person owing a debt or duty to the State, for taxes or for money received or collected by any person, as a public officer, or in a fiduciary capacity, or a cause of action specified in section one thousand nine hundred and sixty-nine of this act, or a judgment recovered upon such a cause of action.

Appeal. — The Court of Appeals will not interfere with a finding of fact as to the intent with which a debtor disposed of his property. *Matter of Sedgwick*, 12 Week. Dig. 270. An adjudication on the merits is held a bar to future application. *Matter of Roberts*, 10 Hun, 253; 59 How. 136. Reversed 70 N. Y. 5, but not on point discussed below. In *Matter of Brady*, 69 N. Y. 215, a proceeding under the Revised Statutes, it was held that the right to review a Special Term decision, in a matter affecting a substantial right, being general and fundamental, will be deemed to exist unless the intent to destroy it is expressed with great clearness.

CHAPTER XI.

GENERAL ASSIGNMENTS.

The purpose of this work being to treat only of such matters as are by the Code termed "Special Proceedings," and as to which it lays down the rules of practice, the consideration of general assignments does not come strictly within the line intended to be followed. But several reasons seem to render it extremely desirable that the subject should be considered in connection with proceedings of a like general character. By chapter 380, Laws of 1885, all the powers theretofore conferred upon County Courts and county

judges are conferred upon the Supreme Court and justices thereof, thus giving a wider scope to the proceeding, and assimilating it more closely to those provided for by the Code. It is, too, very closely allied in its objects to the proceedings with reference to insolvent debtors, and has become a subject of very considerable importance; so much so that a treatise upon practice in special proceedings would be incomplete were it to leave the practitioner to refer simply to the statute, or oblige him to examine a work devoted entirely to that proceeding. Assignments for the benefit of creditors arose as a matter of practice, and were not in the first instance provided for or even regulated by statute; in fact, are said to have grown up in this country. *Dunham v. Waterman*, 17 N. Y. 9. They were first regulated by statute in this State in 1860, and certain restrictions placed upon them, and the manner in which the trust should be executed pointed out. The County Court was given jurisdiction of and control over the matter, and the statute was amended from time to time until, in 1877, the General Assignment Act was put in substantially its present form, retaining most of the features of the act of 1860, but much fuller in its details, and more far reaching in its operation. Under it a large number of adjudications have been made, while many of those made previous to any statute on the subject are still useful in construing its provisions. A history of the law as to voluntary assignments for the benefit of creditors is given, and the analogy between the General Assignment Act and the statutes relating to the administration of decedents' estates is considered in *Matter of Ludington*, 5 Abb. N. C. 307.

ASSIGNMENTS, REQUISITES, ASSENT OF ASSIGNEE. SECTION 2, ACT OF 1877,
CHAPTER 466.

Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee, for the creditors of such debtor, shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds; and every such conveyance or assignment shall be recorded in the county clerk's office of the county where such debtor resided or carried on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. When real property is a part of the property assigned, and is situate in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated. The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged.

It will be seen that this provision assumes the existence of assignments of this character, and does not attempt to define their purpose

or intent in any way, but simply to determine the form and manner of execution in the most general way. The right to make a general assignment, with preferences, grows out of the right of an individual to pay such of his creditors and in such manner as he pleases, provided the others are not defrauded. It is an act of duty by the debtor to his creditors to make the fund available for their benefit, and a debtor may at any time, before his property passes from his control, assign it to trustees for distribution among his creditors. *Nicoll v. Mumford*, 4 Johns. Cas. 522, and this is true though it may incidentally hinder and delay his creditors. *Nicholson v. Leavitt*, 6 N. Y. 510; *Jacobs v. Receiver*, 36 id. 669; *Hauselt v. Vilmar*, 76 id. 630. And the assignment may be made by any person capable of making a contract. *Fox v. Heath*, 21 How. 384.

Assignments by firms and copartners.—But one copartner can not assign the copartnership property that is not within the scope of the copartnership agreement, and cannot be implied from it. *Fisher v. Murray*, 1 E. D. Smith, 41; *Adee v. Cornell*, 25 Hun, 78; *Welles v. March*, 30 N. Y. 344; *Coope v. Bowles*, 42 Barb. 87; *Gates v. Andrews*, 37 N. Y. 657. If authorized to do so by his copartner one may execute the assignment, and such consent may be implied. *Roberts v. Shephard*, 2 Daly, 110; *Kelly v. Baker*, 2 Hill, 531; *Baldwin v. Tyrnes*, 19 Abb. 32. Or it may be ratified by the other partner even though an infant. *Coope v. Bowles*, 42 Barb. 87; *Adee v. Cornell*, 93 N. Y. 572; *Sheldon v. Smith*, 28 Barb. 593. The fact that a partner has absconded will authorize the other partner or partners to execute a general assignment. *Welles v. March*, 30 N. Y. 344; *Palmer v. Meyers*, 43 Barb. 509; *National Bank v. Sackett*, 2 Daly, 397; *Lowenstein v. Flauraud*, 82 N. Y. 494. But this must not be a mere absence from the county without intent to defraud creditors. *Pettee v. Orser*, 6 Bos. 123; *Coope v. Bowles*, 42 Barb. 87. After dissolution, when the partnership assets have been transferred in good faith to continuing partners, they may assign the property transferred for the payment of their debts, but it must be without intent to defraud former creditors. *Smith v. Howard*, 20 How. 121; *Dimon v. Hazard*, 32 N. Y. 65; *Paton v. Wright*, 15 How. 481; *Heye v. Bolles*, 2 Daly, 231; *Hard v. Mulligan*, 8 Abb. N. C. 58; *Mattison v. Demarest*, 4 Rob. 161; *Lester v. Pollock*, 3 id. 691.

As to the right of a surviving partner to make an assignment, no question seems to have arisen, but the power to make preferences in such a case does not seem to be clearly settled. It was upheld in

Loeschigk v. Addison, 4 Abb. (N. S.) 210, where the assignment was made directly to the creditor, and was questioned in *Hutchinson v. Smith*, 7 Paige, 26, where the assignment was to a trustee. It was also upheld in *Williams v. Whedon*, 39 Hun, 98, although liable to be set aside by representatives of deceased partner. See elaborate note, Abb. Dig., 1886, p. 20. A partner may assign his interest in the firm property, subject to payment of firm debts *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; *Haggerty v. Granger*, 15 How. 243; *Menagh v. Whitwell*, 52 N. Y. 146; *Davis v. Grove*, 27 How. 70. An assignment may be made by a limited partnership, but it will be void if it provides for payment of a debt due to the special partner before all the other creditors are paid. *Mills v. Argall*, 6 Paige, 577; *Van Alstyne v. Cook*, 25 N. Y. 492. And the general partners in a limited partnership cannot make an assignment with preferences under 1 R. S., §§ 20, 21. In such case when an assignment with preferences was sought to be made, and afterward a second assignment was made by the same parties to the same assignee, the latter assignment was held valid. *Schwartz v. Soutter*, 103 N. Y. 683. An assignment executed only by the general partner is valid. *Robinson v. McIntosh*, 3 E. D. S. 221; *Darrow v. Bruff*, 36 How. 479. In assignments by a firm, the partnership property must be first applied to pay firm debts. *Bogart v. Haight*, 9 Paige, 296; *Scott v. Guthrie*, 25 id. 512; *Wilson v. Robinson*, 21 N. Y. 587; *Walsh v. Kelly*, 42 Barb. 98; *Egbert v. Wood*, 3 Paige, 517; *Grover v. Wakeman*, 11 Wend. 187; *Leslie v. Wallack*, 3 Robt. 691. And if otherwise applied the assignment is void. *Bank of Granville v. Cohen*, 6 State Rep. 318. And it cannot provide for payment of individual debts out of the surplus, *pro rata* in case the individual debts of the different members of the firm are unequal. *Crook v. Rindskopf*, 21 Week. Dig. 31. Although partnership debts may be preferred by a member of the firm out of his individual assets. See *Royer Wheel Co. v. Fielding*, 101 N. Y. 504; *O'Neil v. Salmon*, 25 How. 246; *Van Rossum v. Walker*, 11 Barb. 237; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46. Where one partner has diverted trust funds, the firm cannot give a preference for their payment, and the assignment attempting to do so is void. *Denton v. Merrill*, 5 State Rep. 387. Individual debts cannot be paid out of firm assets till firm debts are paid. *Walsh v. Kelley*, 42 Barb. 98; *Jackson v. Cornell*, 1 Sandf. Ch. 348; *Wilson v. Robinson*, 21 N. Y. 587. The case is otherwise where the debt of the individual member has been assumed by the firm. *Turner v. Jaycox*, 40 Barb.

164. It may be shown that the preference of individual debts out of firm property was without intent to defraud. *Cox v. Platt*, 32 Barb. 126. But in case of such an assignment, the burden rests on the assignee to show that the individual assets are sufficient to pay the individual debts. *Knauth v. Bassett*, 34 Barb. 31. Where an assignment contemplated the appropriation of all the partnership and individual property of each partner first to the payment of the partnership debts; second, the surplus, if any, due each partner, to the payment of his individual debts, it was held that the assignment was not fraudulent as to the individual creditors of either partner, because his individual property is applied to payment of firm debts. *Becker v. Leonard*, 3 State Rep. 765.

Assignments by corporations.—Corporations independent of the statute can make general assignments for the benefit of creditors. *Coats v. Donnell*, 94 N. Y. 168. But chapter 325, Laws of 1825, enacts that it is not lawful for an incorporated company to make any transfer or assignment in contemplation of insolvency, and declares any such assignment void. *Harris v. Thompson*, 15 Barb. 62; *Sibell v. Remsen*, 33 N. Y. 95; *Loving v. Vulcanizing Co.*, 36 Barb. 329; *Bowen v. Lease*, 5 Hill, 221; *Paulding v. Chrome Steel Co.*, 94 N. Y. 334. This rule applies to banking associations. *Dutcher v. Importers and Traders' National Bank*, 59 N. Y. 5; *Robinson v. Bank of Attica*, 21 id. 406. But it seems other moneyed corporations are exempted by the same statute, but they cannot give preferences. *Marine Bank v. Clements*, 31 N. Y. 33; *Curtis v. Leavitt*, 15 id. 9; *Hill v. Reed*, 16 Barb. 280; *Hulbut v. Carter*, 21 id. 221.

To whom made.—The assignee must be named in the assignment, but a provision for a new assignee in case of resignation of the person named is void. *Planck v. Schemerhorn*, 3 Barb. Ch. 644. Any person may be selected as assignee, subject to the power of the court to remove any incompetent person. *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Webb v. Daggett*, 2 Barb. 11. A creditor may be assignee. *Hawley v. Mancius*, 7 Johns. Ch. 174. But a creditor who accepts the trust cannot enforce a judgment he may hold by execution. *Rogers v. Rogers*, Hopk. Ch. 515. Nor can a firm assign to one of the partners. *Sewall v. Ursell*, 2 Paige, 175. The selection of a relative or friendly assignee may, however, be strong and almost conclusive evidence of a fraudulent intent in making the assignment. *Currie v. Hart*, 2 Sandf. Ch. 353; *Cram v. Mitchell*, 1 id. 251; *Reed v. Emery*, 8 Paige, 417; *Connah v. Sedgwick*, 1 Barb. 210; *Browning v. Hart*, 6 id. 91. More than

one person may be named, although all need not act, but all who qualify must act, or be discharged by the court or the creditors. *Brennan v. Wilson*, 4 Abb. N. C. 279; *Thatcher v. Candee*, 3 Keyes, 160; *Diefendorf v. Spraker*, 10 N. Y. 246; *Moir v. Brown*, 14 Barb. 39.

Form and contents of general assignments.—The assignment usually recites a nominal consideration from the assignee to the assignor, but it is not absolutely necessary. *Cunningham v. Freeborn*, 11 Wend. 240; *Kellogg v. Slauson*, 11 N. Y. 302; *Rockwell v. McGovern*, 69 id. 294. And it must describe the property assigned with reasonable certainty by way of general description, showing it to be all of the assignor's property. The property is described with particularity by the schedules which are part of the assignment. *Terry v. Butler*, 43 Barb. 395; *Matthews v. Poultney*, 33 id. 127; *Turner v. Jaycox*, 40 N. Y. 470; *Platt v. Lott*, 17 id. 478; *De Camp v. Marshall*, 2 Abb. (N. S.) 373.

Validity.—Any reservation or condition as to the assignor's property will be fatal to the assignment. *Grover v. Wakeman*, 11 Wend. 189; *Burdick v. Post*, 12 Barb. 168; *Brigham v. Tillinghast*, 13 N. Y. 215. The trustee should be given the unreserved power to convert the estate into money, and apply it to payment of debts. *Kercheis v. Schloss*, 49 How. 284; *Riggs v. Murray*, 2 Johns. Ch. 565; *Haydock v. Coope*, 53 N. Y. 68; *Litchfield v. White*, 3 Sandf. 545. The assignee will be bound by restrictions, and they will, if not proper, be fatal to the assignment. *Dunham v. Waterman*, 17 N. Y. 9; *Ogden v. Peters*, 21 id. 23; *Jessup v. Hulse*, id. 168; *Keteltas v. Wilson*, 36 Barb. 298. The power to sell the assignor's property, and apply to payment of his debts is all that is necessary. *Planck v. Schemerhorn*, 3 Barb. Ch. 644. Unless preferences are sought to be given. *Frazer v. Truax*, 27 Hun, 587. A provision for payment of expenses of the trust is, however, usual and proper; but at not more than the rate allowed by law. *Keteltas v. Wilson*, 36 Barb. 298; *Jacobs v. Remsen*, 36 N. Y. 668; *Barney v. Griffin*, 2 id. 365. Power to compound debts due the assignor is a proper provision. *Dow v. Platner*, 16 N. Y. 562; *Brigham v. Tillinghast*, 15 Barb. 618; *Bel lows v. Partridge*, 19 id. 176. See *McConnell v. Sherwood*, 94 N. Y. 522. And so of power to pay taxes, rent and insurance. *Morrison v. Atwell*, 9 Bosw. 503; *Van Dine v. Willett*, 39 Barb. 319; *Whitney v. Krows*, 11 id. 198. So the assignee may be author-

ized to employ attorneys and agents. *Jacobs v. Remsen*, 36 N. Y. 668; *Casey v. Jones*, 27 id. 608; *Van Dine v. Willett*, *supra*.

The law has, however, fixed the compensation to the assignee, and it cannot be increased by the assignor to the prejudice of creditors. The attempt to do so would vitiate the assignment. If the assignee is entitled to any further sum by way of compensation, he must look to the assignor. *Bæglar v. Eppley*, 2 State Rep. 101, citing *Matter of Hurlburt*, 89 N. Y. 259, and cases *supra*.

The following are some of the cases holding certain specific provisions inserted in general assignments do not affect their validity. *Mann v. Whitbeck*, 17 Barb. 388; *Hitchcock v. Cadmus*, 2 id. 381; *Halstead v. Gordon*, 34 id. 422; *Whitney v. Krows*, 11 id. 198; *Stern v. Fisher*, 32 id. 198; *Townsend v. Stearns*, 32 N. Y. 209; *Jessup v. Hulse*, 21 id. 168; *Butt v. Peck*, 7 Daly, 83; *Campbell v. Woodworth*, 34 Barb. 425; *Jacobs v. Remsen*, 36 N. Y. 668; *Nichols v. McEwen*, 21 Barb. 65; *Clark v. Fuller*, id. 129; *Kellogg v. Slauson*, 11 N. Y. 302; *Ogden v. Peters*, 21 id. 23; *Griffith v. Marquardt*, id. 131; *Van Rossum v. Walker*, 11 Barb. 237; *Grant v. Chapman*, 38 N. Y. 293; *Carpenter v. Underwood*, 19 id. 520; *Spaulding v. Strang*, 36 Barb. 135; *Low v. Graydon*, 50 id. 414; *Powers v. Graydon*, 10 Bosw. 630; *Dow v. Platner*, 16 N. Y. 562; *McConnell v. Sherwood*, 84 id. 522; *Coyne v. Weaver*, id. 386; *Hastings v. Belknap*, 1 Den. 190; *Bellows v. Partridge*, 19 Barb. 176; *Ward v. Tingley*, 4 Sandf. Ch. 476. The courts are said to lean to a construction favorable to an assignment for the benefit of creditors, and will, if possible, so interpret it as to render it legal and operative. *Grover v. Wakeman*, 11 Wend. 187; *Read v. Worthington*, 9 Bosw. 617; *Benedict v. Huntington*, 32 N. Y. 219; *Bogart v. Haight*, 9 Paige, 297; *Mann v. Whitbeck*, 17 Barb. 388; *Sherman v. Elder*, 24 N. Y. 381; *Kellogg v. Slauson*, 11 id. 302; *Platt v. Lott*, 17 id. 478; *Brainard v. Dunning*, 30 id. 211; *Townsend v. Stearns*, 32 id. 209.

A very large number of decisions have been made as to what vitiates an assignment, giving the different grounds, and no attempt will be made to give more than a general statement, with but a portion of the numerous citations. A reservation by the assignor to himself of any benefit out of or from the assignment before payment of debts in full will invalidate the assignment. *Mackie v. Cairns*, 5 Cow. 549; *Elias v. Farley*, 3 Keyes, 398; *Berry v. Riley*, 2 Barb. 307; *Jackson v. Parker*, Cow. 73; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Grover v. Wakeman*, 11 Wend. 187;

Goodwich v. Down, 6 Hill, 438; *Lentillon v. Moffat*, 1 Edw. 451; *Hyslop v. Clarke*, 14 Johns. 458; *Nicholson v. Leavitt*, 4 Sandf. 252; *Strong v. Skinner*, 4 Barb. 546; *Doremus v. Lewis*, 8 id. 124; *McClelland v. Remsen*, 36 id. 622; *Barney v. Griffin*, 2 N. Y. 365; *Leitch v. Hollister*, 4 id. 211; *Collomb v. Caldwell*, 16 id. 484; *Haydock v. Coope*, 53 id. 68. So will the creation of a trust for the benefit of the assignor. *Collomb v. Caldwell*, 16 N. Y. 484; *Wilson v. Robertson*, 21 id. 587. Or a condition that the creditors must release their entire claims on receiving payment in part. *Armstrong v. Byrne*, 1 Edw. Ch. 79; *Smith v. Woodruff*, 1 Hilt. 462; *Mills v. Levy*, 2 Edw. Ch. 183; *Hyslop v. Clarke*, 14 Johns. 458; *Powers v. Graydon*, 10 Bosw. 630; *Wakeman v. Grover*, 4 Paige, 23; *Woodburn v. Mosher*, 9 Barb. 255; *Hastings v. Belknap*, 1 Den. 190; *Spaulding v. Strang*, 36 Barb. 310. Nor can the assignor authorize the assignee to sell on credit. *D'Ivernois v. Leavitt*, 23 Barb. 63; *Morrison v. Brand*, 5 Daly, 40; *Whitney v. Krows*, 11 Barb. 198; *Burdick v. Post*, 6 N. Y. 522; *Nicholson v. Leavitt*, id. 510; *Barney v. Griffin*, 2 id. 365; *Porter v. Williams*, 9 id. 142; *Rapalje v. Stewart*, 27 id. 310; *Wilson v. Robertson*, 21 id. 587. Or give power to the assignor to give further preferences. *Grover v. Wakeman*, 4 Paige, 24; *Sheldon v. Dodge*, 4 Den. 217; *Hyslop v. Clarke*, 14 Johns. 458; *Averill v. Loucks*, 6 Barb. 470; *Barnum v. Hempstead*, 7 Paige, 571; *Strong v. Skinner*, 4 Barb. 546; *Kercheis v. Schloss*, 49 How. 284; *Boardman v. Hulliday*, 10 Paige, 223; *Frazier v. Truax*, 27 Hun, 587. The assignor cannot exempt the assignee from any liability which he would be subjected to by law. *Litchfield v. White*, 7 N. Y. 478; *Metcalf v. Van Brunt*, 37 Barb. 621; *Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Jacobs v. Allen*, 18 Barb. 495. But this does not relate to a provision exempting him from liability for uncollectible debts. *Casey v. Janes*, 37 N. Y. 608.

The assignee cannot be authorized to mortgage or lease the assigned property, but it seems only that provision, and not the entire assignment, will be void. *Darling v. Rogers*, 22 Wend. 483; *Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Planck v. Schemerhorn*, 3 Barb. Ch. 644. A provision authorizing the assignee to continue the assignor's business invalidates the assignment. *Dunham v. Waterman*, 17 N. Y. 9; *Schlusell v. Willett*, 34 Barb. 615; *Watson v. Brown*, 15 Abb. N. C. 412; *Renton v. Kelly*, 49 Barb. 536. But in the late case of *Robbins v. Butcher*, decided March 1, 1887 (25 Week. Dig. 562), it is held that a provision in an assignment for creditors, empower-

ing the assignee, if necessary, to finish unfinished work and pay expenses thereof, prior to payment of debts, does not invalidate the assignment. Such authority is subject to the approval of the courts, and the assignee is subject to their prohibition. A provision regulating the sale of property and collection of assets renders assignment void. *Brigham v. Tillinghast*, 13 N. Y. 215; *Woodburn v. Mosher*, 9 Barb. 255; *Murphy v. Bell*, 8 How. 468; *Rapelee v. Stewart*, 27 N. Y. 310; *D'Ivernois v. Leavitt*, 23 Barb. 63. But as to this see construction of language used in *Ogden v. Peters*, 21 N. Y. 121; *Jessup v. Hulse*, id. 168; *Townsend v. Stearns*, 32 id. 209; *Clapp v. Utley*, 16 How. 384; *Bellows v. Partridge*, 19 Barb. 176; *Wilson v. Robertson*, 21 N. Y. 587. A provision authorizing the assignor to assume future liabilities for the assignee renders the assignment void. *Lansing v. Wadsworth*, 1 Sandf. Ch. 43; *Barnum v. Hempstead*, 7 Paige, 568; *Carrie v. Hart*, 2 Sandf. Ch. 353; *Elius v. Farley*, 3 Keyes, 398; *Brainard v. Dunning*, 30 N. Y. 211; *Sheldon v. Dodge*, 4 Den. 217. But this does not apply to a provision for debts incurred but not yet due, even if contingent. *Griffin v. Marquardt*, 21 N. Y. 121; *Keteltas v. Wilson*, 36 Barb. 298; *Cunningham v. Freeborn*, 11 Wend. 241; *Bank of Silver Creek v. Talcott*, 22 Barb. 550; *Brainerd v. Dunning*, 30 N. Y. 211.

A provision in an assignment which must necessarily have the effect to hinder, delay, or defraud creditors, is conclusive evidence of fraudulent intent, and vitiates the assignment. *Coleman v. Burr*, 93 N. Y. 31. A schedule, made on an assignment for benefit of creditors, may be referred to and considered a portion of it, for the purpose of ascertaining the existence of an intent to defraud creditors, by including in the schedule a debt that has been paid, and such act renders the assignment void as to other creditors. *Talcott v. Hess*, 31 Hun, 282. A provision authorizing the assignee, in his discretion, to sell or dispose of the assets for such consideration in money or other thing as the assignee may deem sufficient, held an evidence of fraudulent intent on the assignor's part, rendering such assignment void. *Bagley v. Bowe*, 50 N. Y. Super. Ct. 100. An assignment by a partnership is invalidated by a preference of an individual creditor, of one of the partners. *Windmuller v. Dodge*, 67 How. 253. But preferring firm debts out of partnership property does not invalidate. *Becker v. Leonard*, 3 State Rep. 765. A provision for payment of copartnership debts out of individual property is not a fraud on the individual creditors. *Haynes v. Brooks*, 8 Civ. Pro.

10. (It seems the individual creditors made no objection.) The individual assets of members of a firm were directed to be applied equally to payment of their individual debts, which were unequal, as were their individual assets; *held*, the assignment was fraudulent and void. *Crook v. Rindskop*, 34 Hun, 457.

As the creditors of a firm are also the creditors of the individual members of the firm, one partner cannot be permitted to diminish the assets to the prejudice not only of those who are creditors of the firm, but also of each individual member, and the right of the firm's creditors to its property cannot be impaired by any consideration of the interests of an individual partner, and an assignment which defeats that right, or hinders or delays the creditor in enforcing it, is a violation of the statute, and a fraud upon such creditors. *Peckham v. Mattison*, 15 Abb. N. C. 367. It is further held in that case that the rule which avoids an assignment by a firm, which prefers the debts of a partner, does not apply where it prefers debts of a firm composed of a portion of the members of the firm assigning, and such an assignment is not fraudulent. Where a factor who had not guaranteed payment for goods sold preferred consignors for full amount sold, although not all collected, it was held not to be fraudulent. *Whiting v. Lebenheim*, 14 Week. Dig. 415.

An assignment for the benefit of creditors reciting that the assignors are a firm and transferring "our" property for the benefit of "our" creditors, and not referring to assets or debts as individual, is a transfer of firm property only to pay firm debts and not void as providing for the payment of firm debts with individual assets. *Matter of Davis*, 1 How. (N. S.) 79. An assignment by partners of their firm and individual property to pay all their firm debts is not fraudulent on its face, although it fails to make any provision as to the order in which the debts shall be paid, since the assignee is bound by law to make a proper and legal distribution of the assets, that is, out of the firm property to first pay firm debts, and out of the individual property to first pay individual debts. *Friend v. Michaelis*, 15 Abb. N. C. 354. The fact that the assignor, at the assignee's request, promised in advance to aid him in the care and sale of the goods does not establish a fraudulent intention, nor is an assignment void merely because the assignor, previous to the assignment, stated to the assignee that he expected, or had reason to believe, that the assignment would prove temporary only; nor is fraud shown by the assignor and his employees remaining in the employ of assignor. *North River Bank v. Schumann*, 63 How. 476.

A county judge has no power to set aside a general assignment upon the ground that it was procured by the undue influence of the assignee, or was made with intent to hinder or defraud the assignor's creditors. *Matter of Thompson*, 30 Hun, 195. It is further held in the last case cited, that in no event can an assignment be set aside by a general creditor who has not procured a judgment, and to this point is cited *Southard v. Benner*, 72 N. Y. 274; and *Spring v. Short*, 90 id. 538. See, also, *Crouse v. Frothingham*, 97 id. 105. An assignment of personal property in this State, signed and acknowledged out of the State by a non-resident doing business here, and delivered to the assignee here, and accepted by him in an instrument executed here, is deemed executed in this State and must be construed according to our laws. *Grady v. Bowe*, 16 Week. Dig. 136. Defendants resided in New Jersey and made an assignment with preferences in this State which is forbidden by the laws of that State. Both owned personal property in New Jersey not mentioned in the inventory. *Held*, that it was not fraudulent, as such personal property was not property which the assignee was entitled to recover, and that withholding it from the assignee would not invalidate the assignment as it would were the property in the State of New York. *Eastern National Bank v. Hulshizer*, 2 State Rep. 93. Power to complete certain unfinished work, if beneficial to the trust, in the discretion of the assignee does not avoid the assignment. *Watson v. Butcher*, 37 Hun, 391; *Robbins v. Butcher*, 25 Week. Dig. 562. The deposit of the assignment with a stranger after complete execution, to hold until the receipt of further orders from the assignor, or to file when in the judgment of the depository it shall be for the best interest of all the creditors, amounts to a reservation of power to revoke by the assignor and renders the assignment void. *Reichenback v. Winkbaas*, 67 How. 513. The withholding for their own use for any considerable part of an estate from the operation of a general assignment is a fraud on the part of the assignors which will invalidate the assignment as against their creditors. *Iselin v. Henlein*, 16 Abb. N. C. 73. In note to Abbott's Digest, 1885, it is stated that the principle recognized in *Schultz v. Hoagland*, 85 N. Y. 464, that the assignor's intentional omission from the schedules, of property which should have been devoted to payment of their debts, raises an inference of fraud, was applied in *Valentine v. Sulzbacker*, Superior Court, 1884, and that the rule in *Talcott v. Hess*, 31 Hun, 282, and in *Milliken v. Dart*, 26 id. 24, that preferences for fictitious indebtedness shows an intent to defraud,

was applied in *Muser v. Alexander*, Supreme Court, 1884. Both of which cases were reported in Daily Register. The debtor who makes a general assignment must devote all his property to the payment of his debts except such as is exempt by law. Any device to cover up the property for the benefit of the assignor, or to secure to him, directly or indirectly, any benefit is fraudulent. *White v. Fagan*, 18 Week. Dig. 358. To entitle a creditor to set aside an assignment on the ground of fraud, a creditor need not show that the assignee was a party to the fraud. *Talcott v. Hess*, 31 Hun, 282. Suspicion of fraud on the part of the assignor is not sufficient to warrant vacating a general assignment. *Eastern Nat'l Bank v. Hulshizer*, 2 State Rep. 93. It does not invalidate an assignment to make it to a person named "his successors and assigns," the word "assigns" is not entitled to a construction which is illegal. *Hess v. Blakesley*, 2 State Rep. 309; *Flagler v. Schoeffel*, 40 Hun, 178. The withholding of a sum of money from the assignee is such a fraud. An intentional omission of valuable property belonging to the assignor from the schedule of assets is sufficient evidence of fraudulent intent to vitiate the assignment. *Bagley v. Bowe*, 50 N. Y. Super. Ct. 100; *White v. Fagan, supra*. Creditors defrauded by an assignment have a right to waive the fraud, accept the assignment, and come in under it, and if all defrauded have done so the court must enforce the trust upon the application of any one having a valid debt against the assignors. *Matter of Davis*, 1 How. (N. S.) 79. Where creditors having full means of knowing all the facts so acted with reference to the trust as to have ratified it, they cannot maintain an action to set it aside as fraudulent. *Cavanaugh v. Morrow*, 67 How. 241. An action to set aside an assignment cannot be maintained after the fund has been distributed and the assignee discharged. The decree of the county judge has the force and validity of a judgment and protects the assignee. *McLean v. Prentice*, 34 Hun, 504. When the other portions of a general assignment show that a clause directing the "assignors to take possession," etc., of the assigned property is a clerical error, such clause will not vitiate the assignment. It is not necessary to reform the instrument, effect will be given to its apparent meaning without reformation. *Smith v. Bellows*, 3 State Rep. 305. A creditor cannot assail the validity of an assignment in County Court under the provisions of the General Assignment Act. He must resort to those actions and remedies which the law provide. *Matter of Holbrook*, 99 N. Y. 539. The question of whether in making an assignment a fraudulent intent

existed is a question for the jury. *Rose v. Meldrum*, 11 Week. Dig. 354. Where an assignment appears to have been made with intent to hinder, delay or defraud creditors, it affords no protection to an assignee against a sheriff who seeks to enforce by execution a judgment against the debtor. *McConnell v. Sherwood*, 61 How. 67; 84 N. Y. 522. In *Smith v. Longmire*, 12 Week. Dig. 88, the rule that choses of a debtor in the hands of his assignee under a general assignment cannot be attached so as to establish an enforceable lien is reiterated and applied. To render a general assignment void because not executed by all the members of a partnership it must appear that those who did not sign are partners, not as to third persons but between themselves. *Adee v. Cornell*, 25 Hun, 78. The omission from the schedules, or the failure to deliver to the assignee a worthless demand cannot serve as a basis for an inference of fraud. If utterly worthless it may be treated as if it never existed. *Schultz v. Hoagland*, 85 N. Y. 64; *Hoyt v. Godfrey*, 88 id. 669.

Authorizing sale on credit invalidates the assignment, and cannot be cured by new instrument. *Barney v. Griffin*, 2 N. Y. 365; *Nicholson v. Leavitt*, 6 id. 610; *Kellogg v. Slavson*, 11 id. 302; *Porter v. Williamson*, 9 id. 142; *Townsend v. Stearns*, 32 id. 109. So does authority to convert into cash, or otherwise dispose of to the best advantage, or to convert into money or available means. *Rapalee v. Stewart*, 27 N. Y. 310; *Brigham v. Tillinghast*, 13 id. 215, and provision that the assignee shall not be liable for loss except for gross negligence or willful misfeasance. *Litchfield v. White*, 7 N. Y. 438. But authority to convert into money within such convenient time as to him may seem meet at public or private sale, or to sell in such manner as seems to the assignee most for the benefit of creditors, does not avoid. *Townsend v. Stearns*, 32 N. Y. 109; *Benedict v. Huntington*, id. 219. Assignment by firm is presumptively void for preferring individual to firm creditors. *Hulbert v. Dean*, 2 Keyes, 97; *Wilson v. Robertson*, 21 N. Y. 587. A general assignment carries with it all the debtor's property, whether mentioned in the schedules or not. *Platt v. Lott*, 17 N. Y. 478; *Turner v. Jaycox*, 70 id. 470; *Schultz v. Hoagland*, 85 id. 464. A general assignment with preferences is valid if free from fraud. *Hauselt v. Vilmar*, 76 N. Y. 630. But a preference with a view to benefit assignor avoids assignment. *Elias v. Farley*, 3 Keyes, 398. A provision for working up the stock avoids the assignment. *Dunham v. Waterman*, 17 N. Y. 9; *Matter of Dean*, 86 id. 398. But see *Robbins v. Butcher*, 25 Week.

Dig. 562, *supra*. As does also a provision for a counsel fee to an assignee who is a lawyer. *Nicholas v. McEwan*, 17 N. Y. 22. A provision that the assignee shall not be liable for uncollectible debts, however, does not avoid assignment. *Casey v. Janes*, 37 N. Y. 608. An assignment is not avoided by giving priority of payment to a usurious judgment. *Murray v. Judson*, 9 N. Y. 73; *Chapin v. Thompson*, 89 id. 270. Nor by assignee's declarations subsequent to assignment. *Cuyler v. McCartney*, 40 N. Y. 221. Unless he remains in possession. *Adams v. Davidson*, 10 N. Y. 309. But assignor remaining in possession of the assigned property is only presumptive evidence of fraud. *Ball v. Loomis*, 29 N. Y. 412. An assignee may sue to set aside a fraudulent conveyance made by assignor. *McMahon v. Allen*, 35 N. Y. 403. This is authorized by statute. Laws of 1858, chap. 314. But judgment creditors who obtained judgment after the assignment cannot attack such a conveyance as they have no lien. *Spring v. Short*, 90 N. Y. 540; *Crouse v. Frothingham*, 97 id. 112; *Lowery v. Clinton*, 32 Hun, 268. The fund must, when an action is thus brought by the assignee, be distributed to all the creditors. *Crouse v. Frothingham*, 97 N. Y. 112. Simple contract creditors have no standing to set aside an assignment, nor has a receiver appointed in supplementary proceedings, except so far as it shall be necessary to satisfy his debt and costs. *Reubens v. Joel*, 13 N. Y. 488; *Kennedy v. Thorp*, 51 id. 174; *Bostwick v. Menck*, 40 id. 383. And the assignee can only be compelled to account for benefit of all the creditors. *Schuehle v. Reiman*, 86 N. Y. 270. A member of a firm may appropriate his individual property to the payment of the firm debts, and where the firm has made an assignment, a conveyance by an individual member of the firm to the assignee to pay firm debts is not unlawful or void, only the creditors of the individual can attack it. *Royer Wheel Co. v. Fielding*, 101 N. Y. 504. An assignee for the benefit of creditors may attack a chattel mortgage executed by his assignor as fraudulent, and void as to creditors. *Ball v. Slaften*, 98 N. Y. 622.

Compromise.—A provision authorizing the assignee to compromise with creditors of the assignor renders it invalid. *McConnell v. Sherwood*, 84 N. Y. 522; *Coyne v. Weaver*, id. 386. It is said in *Ginther v. Richmond*, 18 Hun, 232, that an assignment is not invalidated by a provision giving the assignees the right to compromise or compound any claim by taking a part for the whole where they shall deem it expedient to do so. But attention is called to

the decision to the contrary in the cases above cited. A general assignment of firm property by one partner to pay his individual debt is fraudulent and void. *Platt v. Hunter*, 11 Week. Dig. 300. A provision in a partnership assignment, providing for payment of individual debts of one creditor, is a fraud on the partnership creditors, and they may set it aside. *Schiele v. Healy*, 61 How. 73.

Preferences.—The general principle that a debtor may, so long as he applies all his property without fraud to the payment of his debts, pay in part or in full any one of his creditors he desires, is applied to a general assignment made by a debtor for the benefit of creditors, and he may make such preferences for such amounts as he prefers, provided always that it is for a subsisting debt. *Auburn Exchange Bank v. Fitch*, 48 Barb. 344; *Leavitt v. Blatchford*, 17 N. Y. 521; *Woodworth v. Sweet*, 51 id. 8; *Archer v. O'Brien*, 7 Hun, 146; *Jacobs v. Remsen*, 36 N. Y. 668; *Casey v. Janes*, 37 id. 608; *Putnam v. Hubbell*, 42 id. 106; *Dana v. Owen*, 54 id. 646.

It has been held that preferential assignments are looked upon with disfavor by the courts. *Meaul v. Phillips*, 1 Sandf. Ch. 83; *Rathburn v. Platner*, 18 Barb. 272; *Wilson v. Ferguson*, 10 How. 175; *Nicholson v. Leavitt*, 4 Sandf. 472. But a different view is expressed in *Townsend v. Stearns*, 32 N. Y. 209, and in the later cases. An insolvent debtor may make an assignment with preferences. *Hauselt v. Vilmar*, 76 N. Y. 630. A preference given to the agent of the assignor's wife in payment of a balance with interest, of money received from the wife's father under an agreement to pay or secure it to the wife held valid. *McCartney v. Welch*, 51 N. Y. 626. A preference to the assignor's wife is valid for money loaned although the partner was married before the Enabling Act in a case where the husband has declined to assert his marital rights. *Jaycox v. Caldwell*, 51 N. Y. 395. A limited partnership cannot prefer the investment of a special partner. *Whitcomb v. Fowle*, 7 Abb. N. C. 295. The right to prefer extends to all legal liabilities. The assignor may prefer a surety or indorser. *Lansing v. Woodworth*, 1 Sandf. 43; *Hendricks v. Walden*, 17 Johns. 438; *Cunningham v. Freeborn*, 11 Wend. 241; *Keteltas v. Wilson*, 36 Barb. 298; *Spaulding v. Strang*, 37 N. Y. 135. Or claims not yet due. *Read v. Worthington*, 9 Bosw. 617. Or creditors who had previously executed a release for a percentage up to the amount of such percentage. *Low v. Graydon*, 50 Barb. 414. And it does not affect the preference that claims have

been purchased at a discount. *Power v. Graydon*, 10 Bosw. 630. Previously secured debts may be preferred but the security must first be exhausted. *Dimon v. Delmonico*, 35 Barb. 554; *Berly v. Lawrence*, 11 Paige, 581. And a preference may be made of a contingent liability. *Grant v. Chapman*, 38 N. Y. 293. But no discretion can be given the assignee as to the order of preference among creditors. *Boardman v. Halliday*, 10 Paige, 223; *Barnum v. Hempstead*, 7 id. 568; *Strong v. Skinner*, 4 Barb. 546.

Fraudulent assignments.—The circumstances surrounding the execution bear so close a relation to the subject that a discussion of the requisites of an assignment would be incomplete without calling attention to some of the grounds upon which the courts have held assignments invalid, outside of the matters appearing on the face of the instrument. The intent of the assignor in making the assignment is held to be material. If it be shown that the intent was to hinder, delay or defraud creditors, the assignment will be declared invalid, and this is true even though the assignor acted in good faith, as he is not a purchaser for value. *Rathburn v. Platner*, 18 Barb. 272; *Work v. Ellis*, 50 id. 512; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Putnam v. Hubbell*, 42 N. Y. 106; *Ruhl v. Phillips*, 48 id. 125; *Dudley v. Danforth*, 61 id. 626; *Wilson v. Kelly*, 24 Barb. 105; *Matthews v. Poultney*, 33 id. 127; *Talcott v. Hess*, 31 Hun, 282; *Schultz v. Hoagland*, 85 N. Y. 464. Contemporaneous acts of the assignor are evidence of intent. *Peck v. Crouse*, 46 Barb. 151; *Haydock v. Coope*, 53 N. Y. 68; *Byrd v. Hall*, 2 Keyes, 646; *Wilson v. Lamont*, 10 How. 175. And if the assignor remains in possession of the assigned property his acts and declarations while in possession are competent evidence. *Adams v. Davidson*, 10 N. Y. 309; *Newlin v. Lyon*, 49 id. 661; *Tilson v. Terwilliger*, 56 id. 273. Or a conspiracy between assignor and assignee to defraud may be shown. *Cwyler v. McCartney*, 40 N. Y. 221. The retaining of possession by the assignor is, under the statute, presumptive evidence of fraud. *Adams v. Davidson*, 10 N. Y. 309; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Connah v. Sedgwick*, 1 Barb. 210; *Van Buskirk v. Warren*, 2 Keyes, 119; *Ball v. Loomis*, 29 N. Y. 412; *Pine v. Rikert*, 21 Barb. 469; *Dolson v. Kerr*, 5 Hun, 643; *Wilson v. Forsyth*, 24 Barb. 105; *Griswold v. Sheldon*, 4 N. Y. 581; *Terry v. Butler*, 43 Barb. 395; *Russell v. Lasher*, 4 id. 232; *Dewey v. Adams*, 4 Edw. Ch. 21; *Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Stoddard v. Butler*, 20 Wend. 507; *Wilson v. Ferguson*, 10 How. 175. But the presumption of fraud may be

rebutted. *Hall v. Tuttle*, 8 Wend. 375; *Smith v. Acker*, 23 id. 653. This rule is not absolute as to real estate, but where the assignor remained in possession of real estate for a long period it has been applied. *Every v. Egerton*, 7 Wend. 259; *Clute v. Newkirk*, 46 N. Y. 684; *Bank of Orange Co. v. Fink*, 7 Paige, 87.

But declarations by the assignor subsequent to the execution of the instrument, and when not in possession, are no evidence of fraudulent intent in making the assignment. *Peck v. Crouse*, 46 Barb. 151; *Cuyler v. McCartney*, 40 N. Y. 221; *Ogden v. Peters*, 15 Barb. 560. Nor any subsequent fraudulent act not connected with the assignment or possession of the property. *Schultz v. Hoagland*, 85 N. Y. 464. An assignment, by the terms of which the assignee is directed, after the payment of certain preferred creditors, to return the surplus, if any, to the assignor, without making any provision for the other general creditors, is void as against the latter. It cannot be validated as against such a creditor who has obtained a judgment, by a new assignment. Such second assignment is ineffectual for any purpose, as the assignor has no power to convey. *Sutherland v. Bradner*, 39 Hun, 134. The providing for payment of fictitious debts is fraudulent, and renders the assignment void. *Terry v. Butler*, 35 Barb. 395; *Jacobs v. Remsen*, 36 N. Y. 668; *Brainard v. Dunning*, 30 N. Y. 211; *American Ex. Bank v. Webb*, 36 Barb. 291; *DeCamp v. Marshall*, 2 Abb (N. S.) 373; *Webb v. Daggett*, 2 Barb. 9; *Fiedler v. Day*, 2 Sandf. 594; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Bostwick v. Menck*, 40 N. Y. 383. But a debt outlawed, or to which there is a defense, is not in this category. *Livermore v. Northrup*, 44 N. Y. 107; *Murray v. Judson*, 9 id. 73. A provision for claims that have been paid is fraudulent. *Talcott v. Hess*, 31 Hun. 282. As is an omission of assets from the schedule if intentional. *Schultz v. Hoagland*, 85 N. Y. 464. As is the fact that the assets are to the knowledge of the assignor largely in excess of debts. *Livermore v. Northrup*, 44 N. Y. 107. But the mere fact that incidental delay will result to the creditors, and that the assignor desires to gain time or to prevent a levy under execution, does not constitute fraud. *Nicholson v. Leavitt*, 6 N. Y. 510; *Townsend v. Stearns*, 32 id. 209; *Griffin v. Marquardt*, 21 id. 121; *Welles v. Marsh*, 30 id. 344. Assignment by persons out of the State, and assignment by non-residents, made and delivered in this State, are not regarded as a foreign assignment. *Grady v. Bowes*, 11 Daly, 259. An assignment of real estate is governed by the law of the State in which it is situated, but

a transfer of personal property is controlled by the law of the residence of the assignor, unless it is made in the face of a positive statute or rule of law of the place where the property is situated. *D' Ivernois v. Leavitt*, 23 Barb. 63; *Nicholson v. Leavitt*, 4 Sandf. 252; *Moore v. Willett*, 35 Barb. 663; *Guillander v. Howell*, 35 N. Y. 637; *Ockerman v. Cross*, 54 id. 29; *Warner v. Jaffray*, 96 id. 248. A debtor will not be permitted, at or before the time the debt is created, by a secret tacit agreement, or understanding, with any one or more of his creditors, to make an engagement in reference to his property, by which their debts shall, in case of an emergency, be preferred under any and all circumstances, and by such an arrangement in effect place a secret mortgage on his property. *National Park Bank v. Whitmore*, 40 Hun, 499.

Assent of assignor.—It is necessary that the assignee accept the trust as prescribed by the statute. *Rennie v. Bean*, 24 Hun, 123. An assignment recorded without such assent is defective, and the defect is not cured by making and recording the assent separately, even though immediately on discovering the inadvertent omission. *Schwartz v. Soutter*, 41 Hun, 323. See *Rennie v. Bean*, 24 id. 123; *Crosby v. Hillger*, 24 Wend. 280. Under the practice before the statute of 1877 it was held in *Metcalf v. Van Brunt*, 37 Barb. 621, that taking possession of the property would amount to an acceptance, but see the language of this act.

Acknowledgment.—A general assignment is not valid unless acknowledged. And it must be subscribed and acknowledged by the assignee before the assignment is recorded or it will be void, and with the instrument itself, and not to a separate agreement. *Noyes v. Wernberg*, 15 Abb. N. C. 164; *Brennan v. Wilson*, 4 id. 279. See 101 N. Y. 472, and 34 Hun, 511, below. The assignor and assignee must both acknowledge its execution before a competent officer. *Fairchild v. Gwynne*, 16 Abb. 23; *Hardman v. Bowen*, 39 N. Y. 196; *Britton v. Lorenz*, 45 id. 51; *Jones v. Bach*, 48 Barb. 568; *Smith v. Tim*, 14 Abb. N. C. 447; *Smith v. Boyd*, 10 Daly, 149; *Treadwell v. Sackett*, 50 Barb. 440. An attorney in fact may acknowledge. *Lowenstein v. Flaurand*, 32 N. Y. 494, and the same was held in *Baldwin v. Tynes*, 19 Abb. 32. All the resident members of a partnership making an assignment must join in the acknowledgment. *Treadwell v. Sackett*, 50 Barb. 440; *Cook v. Kelly*, 14 Abb. 466. But all need not join where one of the parties is a non-resident. *Darrow v. Bruff*, 36 How. 479, or has absconded. *Nat. Bank v. Sackett*, 2 Abb. (N. S.) 286; *Welles v.*

Marsh, 30 N. Y. 344. The assignee, however, cannot question the validity of the assignment for want of an acknowledgment. *Randall v. Dusenberry*, 39 N. Y. Super. Ct. 174. And a mere clerical error in the acknowledgment will not vitiate it. *Claflin v. Smith*, 15 Abb. N. C. 241. The validity of an assignment cannot be attacked collaterally on the ground it was not acknowledged before delivery. *Randall v. Dusenberry*, 39 N. Y. Super. Ct. 174; affirmed, without opinion, 63 N. Y. 645.

An assignment for the benefit of creditors, recorded without the assent of the assignee having been subscribed and acknowledged, although he may have orally agreed to act, is void against creditors claiming under an attachment against the assignor's property. *Rennie v. Bean*, 24 Hun, 123. A defective acknowledgment is an irregularity that cannot be cured so as to give the assignee title over attaching creditors. *Smith v. Boyd*, 10 Daly, 149. This case is reversed, 101 N. Y. 472, and it is held, that where on the same paper, and following the signatures to an assignment, was written a notary's certificate of acknowledgment, bearing the same date as the assignment, and naming as the persons acknowledging, the ones who apparently executed the assignment, and stating that the persons were to the notary "known to be the individuals described in and who executed the same;" that the words "the same" referred to the instrument to which the certificate was appended, and sufficiently identified the same, and that the certificate showed a due acknowledgment of the instrument. An assignment is not invalidated by reason of a clerical error in the certificate of acknowledgment. *Claflin v. Smith*, 15 Abb. N. C. 241. See, contra, *Smith v. Tim*, 14 Abb. N. C. 447. Where a proper certificate of acknowledgment was added after record, and a new record made, it was held that the assignment took effect as of date of record. *Camp v. Buxton*, 34 Hun, 511.

Recording assignment. — It is necessary that the assignment be recorded in order to pass title. *McBlain v. Spelman*, 6 Civ. Pro. 403; *Simon v. Kaliske*, 6 Abb. (N. S.) 224; *Rennie v. Bean*, 24 Hun, 123; *Smith v. Boyd*, 18 Week. Dig. 461. But the omission to record the assignment is no evidence of fraudulent intent on the part of the assignor. *Denger v. Mundy*, 5 Robb. 636. When a non-resident assigns, the assignment should be recorded where the real estate of the assignor is situated. *Scott v. Guthrie*, 25 How. 481. The delivery of the assignment for record is *prima facie* a delivery to the assignee. *Fryer v. Rockefeller*, 63 N. Y. 268. Title

to the property passes on the delivery of the assignment, and subsequent requirements of the statutes, such as recording, are directory.

Warner v. Jaffray, 96 N. Y. 248; *McBlain v. Spellman*, 35 Hun, 263; *Nicoll v. Spowers*, 6 State Rep. 457.

Precedent for Assignment.

This indenture made this third day of July, in the year one thousand eight hundred and eighty-five, by and between Rudolph Aikens, of the town and county of Ulster, State of New York, party of the first part, and James H. Everett, of the city of Kingston, said county, of the second part, witnesseth that, whereas the party of the first part is indebted to divers persons in sundry sums of money which he is unable to pay in full, and is desirous of providing for the payment of the same so far as in his power by an assignment of all his property for that purpose:

Now, therefore, the said party of the first part, in consideration of the premises, and of the sum of one dollar, to him paid by the party of the second part upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said party of the second part, his heirs, executors, administrators and assigns, all and singular the lands, tenements, hereditaments and appurtenances, and goods, chattels, stock, promissory notes, debts, claims, demands, property and effects of every description belonging to the party of the first part, wherever the same may be, except such property as is exempt by law from levy and sale under execution, to have and to hold the same, and every part thereof, unto the said party of the second part, his heirs, executors, administrators and assigns. In trust, nevertheless, to take possession of the same, and to sell the same with all reasonable dispatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectible, and with and out of the proceeds of such sales and collection,

First. To pay and discharge the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, together with a lawful commission to the party of the second part for his services in executing said trust, and also to make payments required by chapter 328 of Laws of 1884, as amended by chapter 283, Laws of 1886.

Second. To pay to Caroline F. Smith, of Vineland, New Jersey, widow of Benjamin Smith, deceased, in full for a certain promissory note made by me and Margaret D. Smith, and held by said Caroline in the sum of \$2,000, and all unpaid interest thereon. If the residue of said proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the said residue toward the payment of said note.

Third. After the payment of the note mentioned in the previous preference in full, the said party of the second part shall pay the following parties in full for the following notes held by them respectively:

GENERAL ASSIGNMENTS.

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To the National Bank of Newburgh, note of Cornelius C. Smith, indorsed by Peck, Van Dalfsen & Co., due July 27, 1885	\$1,500
Note of Cornelius C. Smith, indorsed by D. H. Selleg, due July 25, 1885	2,121
To Peck, Van Dalfsen & Co., of Newburgh, note of Cornelius C. Smith, indorsed by Peck, Van Dalfsen & Co., due June 27, 1885	2,500
To Quassaick National Bank, of Newburgh, note of Cornelius C. Smith, indorsed by Peck, Van Dalfsen & Co., due September 5, 1885	600
To Charles A. Harcourt, of Newburgh, note of Cornelius C. Smith, of date February 11, 1882, and arrearages of interest.....	1,000

If the residue of said proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the residue of said proceeds to and for the payment of the said notes mentioned in this preference, ratably and in proportion to the respective amounts thereof.

Fourth. And after fully paying and discharging all the aforesaid debts as before provided, the said party of the second part shall pay all and singular all other debts and liabilities of the party of the first part; and if such residue be not sufficient to pay and discharge all such debts and liabilities in full, then the said party of the second part shall apply the residue of said proceeds to and in payment of the debts and liabilities mentioned in the preference, ratably and in proportion to the respective amounts thereof.

Fifth. And if after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said party of the first part, his executors, administrators and assigns. And in furtherance of the premises, the said party of the first part does hereby make, constitute and appoint the said party of the second part his true and lawful attorney irrevocable, with full power to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created; and to ask, demand, recover and receive of, and from all and every person or persons, all property debts, demands due owing and belonging to the said party of the first part, and hereby transferred, and to give acquittances and discharges for the same, to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances.

And the party of the first part does hereby authorize the said party of the second part to sign the name of the said party of the first part to any check, draft, promissory note, or other instrument in writing, which is payable to the order of the said party of the first part, or to sign the name of the party of the first part to any instrument in writing, whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

The said party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and

agrees to and with the said party of the first part, that he will faithfully, and without delay, execute the trust hereby created according to the best of his skill, knowledge and ability.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

(Signatures of assignor and assignee.)

Sealed and delivered in presence of

(Add acknowledgement.)

Precedent for Partnership Assignment.

Know all men by these presents, that we, Foster T. Dunwoody, Charles O. Dunwoody and William O. Vedder, heretofore carrying on business under the name and style of Dunwoody Brothers & Vedder, at Kingston, Ulster county, New York, being justly indebted to sundry persons in divers sums of money, which we are unable to pay in full, and being desirous of providing for their payment by assigning all our property; for that purpose we, as a copartnership and individually, in consideration of one dollar to us in hand paid by James H. Everett, of the same place, the receipt whereof is hereby acknowledged, and of the uses, trusts and purposes hereinafter mentioned, have granted, sold, assigned, transferred and set over; and by these presents do grant, sell, assign, transfer and set over unto the said James H. Everett, his heirs, executors, administrators and assigns, all the lands, tenements and hereditaments, goods, chattels and effects, and all accounts, debts and demands due or belonging to us, both as copartners and as individuals, together with all securities for the same, to have and to hold the same with all the appurtenances unto the said James H. Everett, his heirs, executors, administrators and assigns, in trust nevertheless. The said James H. Everett shall forthwith take possession of the property and premises of the said firm of Dunwoody Brothers & Vedder, and of the individual members thereof hereby assigned, and with all reasonable diligence, sell and dispose of the same by public or private sale for the best price that can be obtained, and convert the same into money, and also to collect all such debts, accounts or demands as may be collectible, and with and out of the proceeds of such sales and collections shall:

First. Pay and discharge all the just and reasonable expenses, costs, and charges of executing this assignment and of carrying into effect the trust hereby created, together with lawful commissions to the party of the second part for his services in executing said trust.

Second. To pay out of the partnership funds and assets next after said costs and expenses chargeable thereto, four notes indorsed by the said firm of Dunwoody Brothers & Vedder, and held and owned by the Kingston National Bank, for \$500 each, two of which are dated December 15, 1883, one being made by Foster T. Dunwoody, the other by Charles O. Dunwoody; two of which are dated March 9, 1884, one of which is made by Foster T. Dunwoody, and one by Charles O. Dunwoody, all payable to the order of Delia C. Vedder. In case said assets are insufficient to pay in full, the same to be applied ratably.

Third. After the payment of said four notes in full, to pay out of said partnership funds and assets the sum of \$1,000, with interest thereon due and owing from said firm to George W. Vedder, of Rhine-

beck, N. Y., for moneys loaned it, also the sum of \$500 due Delia C. Vedder from said firm, for moneys loaned and advanced it. In case the firm assets are insufficient to pay said debts in full, then the same to be paid ratably, in proportion to their respective amounts.

Fourth. After such payments next to pay out of the partnership assets the sum of \$519, due Everett & Treadwell for merchandise sold the firm of Dunwoody Brothers & Vedder.

Fifth. After the said payment in full of all said debts hereinbefore set forth, to apply the remaining proceeds of the partnership property in payment of the remaining partnership debts, and in case the proceeds are insufficient to pay the same, to distribute such proceeds ratably among said remaining creditors, in proportion to their respective claims.

Sixth. In case there is any surplus after paying firm debts in full, then to apply the same in payment of the individual debts of each of said members of the firm, in case any remain unpaid, out of their individual assets, paying to the creditors of each member the proportion to which each member would be entitled.

Seventh. Out of the net proceeds of the individual property of Foster T. Dunwoody to first pay Delia C. Vedder the sum of \$320, due her on account of board of said Foster T. Dunwoody.

Eighth. After paying said sum of \$320 to Delia C. Vedder, next to pay out of said proceeds of his individual property the two notes made by said Foster T. Dunwoody and held by the Kingston National Bank, for \$500 each, mentioned and fully described in the second clause of this instrument, and indorsed by said Delia C. Vedder and the said firm.

Ninth. Next after such notes, to pay out of said individual assets of said Foster T. Dunwoody any individual indebtedness of said Foster T. Dunwoody, or apply the proceeds ratably thereon, first paying in full the note held by George W. Vedder, in case he has individually indorsed the same.

Tenth. Next after said individual indebtedness, to apply the proceeds of such individual assets of said Foster T. Dunwoody to the payment of the claim of Delia C. Vedder of \$500 against the said firm, for moneys loaned, and the said note of George W. Vedder for \$1,000, for money loaned, in case the said Foster has not indorsed said note individually, and in case the same is insufficient to pay in full, then ratably.

Eleventh. To apply next thereafter said individual property of said Foster T. Dunwoody to the payment of indebtedness heretofore set forth, of \$519 to Everett & Treadwell, or so much as shall remain unpaid.

Twelfth. After said payments as aforesaid, in full, to apply the balance of such individual assets of Foster T. Dunwoody *pro rata* to the payment of the firm debts, in case any remain unpaid, out of the firm assets.

Thirteenth. Out of the net proceeds of the individual property and assets of Charles O. Dunwoody, to first pay Delia C. Vedder the sum of \$240, due her on account of board.

Fourteenth. Next after such payment to Delia C. Vedder, to pay out of said individual property of Charles O. Dunwoody two notes

made by him, held by the Kingston National Bank, for \$500 each, heretofore described in clause second of this instrument, and indorsed by said Delia C. Vedder and said firm.

Fifteenth. Next after such notes, to pay out of said individual assets of said Charles O. Dunwoody any individual indebtedness by said Charles O. Dunwoody, or apply the proceeds ratably thereon, first paying in full the note held by George W. Vedder, in case he has individually indorsed the same.

Sixteenth. Next after said individual indebtedness, to apply the proceeds of such individual assets of said Charles O. Dunwoody to the payment of the claim of Delia C. Vedder of \$500 against the said firm, for moneys loaned, and the said note of George W. Vedder for \$1,000, for money loaned; in case the same is insufficient to pay in full, then ratably.

Seventeenth. To apply next thereafter said individual property of said Charles O. Dunwoody to the payment of indebtedness heretofore set forth of \$519 to Everett & Treadwell, or so much as shall remain unpaid.

Eighteenth. After said payments as aforesaid in full to apply the balance of such individual assets of Charles O. Dunwoody *pro rata* to the payment of the firm debts in case any remain unpaid out of the firm assets.

Nineteenth. Out of net proceeds of the individual property of William O. Vedder to first pay George W. Vedder the \$1,000 due him on note now a debt of the firm, or apply it thereon.

Twentieth. To pay out of the individual property of William O. Vedder next thereafter any individual debts of said William O. Vedder, or apply it ratably.

Twenty-first. If there remain any surplus out of said individual property of William O. Vedder, to apply it ratably on the firm debts for which he is liable.

Twenty-second. And if, after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said parties of the first part, their executors, administrators and assigns.

And in furtherance of the premises the said parties of the first part do hereby make, constitute and appoint the said party of the second part our true and lawful attorney irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons all property, debts, demands, due, owing and belonging to the said party of the second part, and to give acquittance and discharges for the same, to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances.

In witness whereof the parties to these presents have hereunto set their hands and seals the 14th day of March, A. D. 1886.

FOSTER T. DUNWOODY, [L. S.]

CHARLES O. DUNWOODY, [L. S.]

WILLIAM O. VEDDER, [L. S.]

DUNWOODY BROTHERS & VEDDER. [L. S.]

Sealed and delivered in }
the presence of }

H. E. MCKENZIE.

I hereby accept the trust created by the above instrument and covenant faithfully to perform the same.

JAMES H. EVERETT.

Dated *March 14, 1886.*
(*Add acknowledgment.*)

INVENTORY.

§ 3. A debtor making an assignment shall, at the date thereof or within twenty days thereafter, cause to be made and delivered to the county judge of the county where such assignment is recorded, an inventory or schedule containing:

1. The name, occupation, place of residence, and place of business of such debtor.

2. The name and place of residence of the assignee.

3. A full and true account of all the creditors of such debtors, stating the last known place of residence of each, and the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same, according to the best knowledge of such debtor.

5. An affidavit made by such debtor that the same is in all respects just and true. But in case such debtor shall omit, neglect or refuse to make and deliver such inventory or schedule within the twenty days required, the assignee named in such assignment shall, within thirty days after the date thereof, cause to be made and delivered to the county judge of the county where such assignment is recorded, such inventory or schedule as above required, in so far as he can, and for such purpose the county judge shall at any time, upon the application of such assignee, compel by order such delinquent debtor, and any other person to appear before him and disclose upon oath any knowledge or information he may possess necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief. But in case the said assignee shall be unable to make and file such inventory or schedule within said thirty days, the county judge may, upon application under oath, showing such liability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said thirty days, or such further time as may be allowed, the county judge may require by order the assignee forthwith to appear before him and show cause why he should not be removed. Any person interested in the trust estate may apply for such order and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any debtor. The county judge is authorized by order to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is hereby declared to be a contempt and obedience to such order may be enforced by attachment. The inventory or schedule shall be filed by said county judge in the office of the clerk of the county in which said assignment is recorded.

The following enactment, being chapter 380, Laws of 1885, con-

fers powers and duties relating to general assignment on Supreme Court:

All powers, rights, duties conferred upon County Courts and county judges by chapter four hundred and sixty-six of the Laws of eighteen hundred and seventy-seven, entitled "An act in relation to assignments of the estates of debtors for the benefit of creditors," and by acts amendatory thereof and additional or supplemental thereto, are hereby also conferred upon and shall be exercised by the Supreme Court and the justices of the Supreme Court of the State of New York concurrently with County Courts and county judges. All applications under said acts made in the Supreme Court shall be made to the court, or a justice thereof, within the judicial district where the assignment is recorded, and all proceedings and hearings under said acts had in the Supreme Court upon the return of a citation shall be had at a Special Term of said court held in the county where the judgment debtor resided at the time of the assignment; or in case of an assignment by copartners, in the county where the principal place of business of such copartners was at the time of the assignment.

What should be scheduled.—The assignor may assign every thing which under the law is assignable; the test has been stated to be that any thing which would pass to the personal representative of a deceased person may pass to a general assignee, and a cause of action for any wrong which would thus survive may be assigned. *Zabriskie v. Smith*, 13 N. Y. 322; *Hyslop v. Randall*, 4 Duer, 660; *McKee v. Judd*, 12 N. Y. 622; *Sherman v. Elder*, 24 id. 381; *Richtmeyer v. Remsen*, 38 id. 206; *Whitaker v. Merrill*, 30 Barb. 389; *Merrill v. Grinnell*, id. 594; *Jackson v. Losee*, 4 Sandf. Ch. 381; *Pulver v. Harris*, 52 N. Y. 73; *Brooks v. Hanford*, 15 Abb. 342; *McQueen v. Babcock*, 41 Barb. 337. Real estate passes to the assignee subject to incumbrances and personal property subject to levy or lien. *Warren v. Fenn*, 28 Barb. 333; *Mumper v. Rushmore*, 79 N. Y. 19; *Main v. Green*, 32 Barb. 448; *Van Dine v. Willett*, 38 id. 319. Personal property of all kinds and choses in action pass under the assignment. *Coffin v. McLean*, 80 N. Y. 560; *Millikin v. Dart*, 26 Hun, 24. Hence all property should be included in schedule. But it all passes whether scheduled or not, though the omission to schedule may be evidence of fraud: But a mere omission, unless with fraudulent intent, will not avoid the assignment. *Mathison v. Demarest*, 4 Robt. 161; *Platt v. Lott*, 17 N. Y. 478; *Turner v. Jaycox*, 40 id. 471. When prepared by the assignor, the inventory and schedules are regarded as part of the assignment. *Terry v. Butler*, 43 Barb. 395; *De Camp v. Marshall*, 2 Abb. (N. S.) 373. Failure to file the schedules and inventory does not affect the validity of the assignment. *Produce Bank v. Morton*, 67 N.

Y. 199; *Warner v. Jaffray*, 96 id. 248. But the debtors must all verify the schedules. *Cook v. Kelly*, 14 Abb. 466. It is held in *Pratt v. Stevens*, 94 N. Y. 387, that, in the absence of the county judge, the inventory may be filed with the clerk, that the schedules need not include securities known to be fraudulent, and that an affidavit to "deponent's best knowledge, information and belief" was sufficient. It is said that the affidavit attached to inventory on a general assignment, if made by the assignor, must be absolutely that such inventory is in all respects just and true, no other is sufficient to render the assignment valid. *Pratt v. Stevens*, 26 Hun, 229; but this is reversed, 94 N. Y. 387.

The assignor's schedule, though made after assignment, is effectual to validate a mortgage which otherwise might have been invalidated for usury. *Matter of Thompson*, 30 Hun, 195; *Pratt v. Adams*, 7 Paige, 615; *Chafin v. Thompson*, 89 N. Y. 220. The inventory of debts need not, in addition to specification of time of payment, dates, payees, etc., of promissory notes, state what they were given for. Only valid securities need to be stated in the inventory, and if the assignor knows a security to be fraudulent, he is not bound to state it. In the absence of the county judge from the office, the inventory may be delivered to his clerk at his office, and a delivery to a county judge of another county, holding court in the county where the assignment is made at the time, is sufficient compliance with the statute. *Pratt v. Stevens*, 94 N. Y. 387; reversing 26 Hun, 229. An assignment of all the property mentioned in schedule B, to pay debts mentioned in schedule A, and referring to the schedules as annexed, though not so annexed in fact, and not recorded in the county clerk's office with the assignment, is valid, as neither of the schedules was a part of the assignment. *Burghard v. Sondheim*, 50 N. Y. Super. 116. A judgment in favor of the assignee will pass by the assignment, although not named in the inventory, and no knowledge of its existence comes to the assignee. *Emigrant Industrial Savings Bank v. Roche*, 93 N. Y. 374. Intentional omission from schedules raises presumption of fraud. Abb. Dig., 1885, Assignments, p. 26, citing 85 N. Y. 464. When the inventory of an insolvent debtor contained the names of the creditors, with their residences, and the amounts of debts owing, and then a brief and very general statement of what the debts were created for, it was held that it complied with the requirements of the statute, and was sufficient to include the cause and consideration of the indebtedness, and the nature of the several debts. *Eastern*

National Bank v. Hulshizer, 2 State Rep. 93. Where schedules are made up by the assignee, they cannot be regarded as characterizing the intent of the assignor in making the assignment. *Denton v. Merrill*, 43 Hun, 224. Otherwise when made by the assignor. *Terry v. Butler*, 43 Barb. 395.

The schedules should, if possible, be verified by the assignor, since he must necessarily be much better acquainted with his assets and liabilities than the assignee can possibly become within the period allowed for filing the inventory by the statute.

The assignor in care of a stock of goods must be much better acquainted with their value under ordinary circumstances than any person who may be called on to appraise their value; and it must not be overlooked that the assignee is bound by the value of the articles placed upon the inventory to the extent that the burden is upon him of showing them to be of less value, and the creditors are also bound to extent that the burden is upon them of showing greater value than appears by the inventory. *Matter of Wolf*, 1 State Rep. 173.

It is not the usual practice in the County Courts to require the affidavits of disinterested experts to the value of the assets inventoried as is required by rule 8 of the Common Pleas, yet in case of doubt as to the fairness of the inventory, an order for such examination would doubtless be granted on a proper showing to the court by affidavit or petition. (See Rules of Common Pleas, page 279.) A reference to the rules and practice in the Common Pleas will be found desirable even by practitioners in the County Courts since the statute leaves very many of the details of the practice unsettled, and these rules are the only formulated practice, and in the absence of other regulations, are recognized by the courts as a safe guide in administering insolvent estates under general assignment.

The inventory will usually require additional schedules to those given in the following precedent, which may readily be added:

*Schedules and Inventory connected with the General Assignment of
Rudolph Akin.*

The name of the assignor or debtor is Rudolph Akin, his occupation is a farmer, his place of residence and place of business is in the town of Ulster, Ulster county, State of New York. The name of the assignee is James H. Everett, and his place of residence is in the city of Kingston, said county of Ulster.

A full and true inventory of all the estate of Rudolph Akin, on the 3d day of July, 1885, the date of the assignment of the said Rudolph Akin, both real and personal, in law and in equity, and the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of such estate, according to the best knowledge of said assignor.

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ASSETS.	Nominal value.	Actual value.	Cause of difference.	Incumbrances.
Lots Nos. 564 and 565 on map of property of Jonathan Hasbrouck, in the village of Newburgh, made by Chauncey Gidney, and bounded south by Washington street, north by Scotia alley, and being 50 feet front and rear, and 100 feet deep. City lot in said city of Newburgh bounded north by Fourth street, east by N. Y. & W. E. R. R. Co., south by Charles H. Dougherty, and west by Water street.	\$10,000 35,000	\$10,000 35,000	No Incumbrance. Incumbered by a mortgage held by John De Groff, for \$21,500, and interest from Feb. 1, 1885. Mortgagee resides in New York city. Mortgage for borrowed money.
Stock of goods in store in town of Ulster, as per schedule hereto annexed Note of John D. Wilson, dated May 7, 1882 Note Charles Gorman, dated April 12, 1874. Chattel mortgage on personal property of Henry Smith. Real estate mortgage made by E. B. Nelson, May 3, 1879. Note C. D. Wells, dated May 16, 1883 Accounts on books as per schedule annexed Fixtures in and about store. Household furniture.	Incumbrance to be deducted. 6,000 820 312 150 1,600 100 1,200 200 500	Incumbrance to be deducted. Nothing Nothing Nothing 75 Nothing Nothing 250 100 800	Depreciation. Maker worthless. Maker worthless. Depreciation. Second mortgage and property foreclosed. Maker worthless. Parties worthless. Depreciation. Depreciation.	

A full and true account of all the creditors of Rudolph Akin, with the last known place of residence of each, the sum owing to each of them by the said Rudolph Akin, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

CREDITORS.	Last known place of residence.	Amount.	The true cause and consideration therefor.	Statement of any existing security for the payment of same.
Caroline F. Smith.....	Vineland, N. J....	\$2,000	Money borrowed in erecting store at Newburgh. Debt incurred at Kingston.....	Margaret D. Akin is a joint maker with Rudolph Akin of the note which represents said debts, but the debt is for Rudolph Akin only to pay.
The National Bank of Newburgh..	Newburgh, N. Y.	1,500	Money advanced by said bank in discounting note of Rudolph Akin, due July 27, 1886. Debt incurred at Newburgh.....	Peck, Van Dalfsen & Co., of Newburgh are accommodation indorsers on said note.
The National Bank of Newburgh.	Newburgh, N. Y.	2,121	Money advanced as above on note of Rudolph Akin, due July 25, 1886. Debt incurred at Newburgh.....	D. M. Sellig of Newburgh, an accommodation indorser on said note.
Peck, Van Dalfsen & Co.....	Newburgh, N. Y.	2,500	Note of Rudolph Akin indorsed by owners and discounted at bank; taken up by holders, and due June 27, 1886. Debt incurred at Newburgh.....	
Quassala National Bank.....	Newburgh, N. Y.	600	Money advanced on discount of note of Rudolph Akin, due Sept. 8, 1886, by said bank. Debt incurred at Newburgh.....	Note indorsed by Peck, Van Dalfsen & Co., as accommodation indorsers.
Henry G. Wells.....	New York.....	4,000	Goods sold.....	None.
Martin Hotaling.....	Poughkeepsie.....	1,576	Goods sold.....	None.
Merritt & Co.....	Kingston.....	1,217	Goods sold.....	None.
Van Heusen & Co.....	Newburgh.....	1,413	Goods sold.....	None.
Lewis De Graff.....	New York.....	1,122	Goods sold.....	None.
Harris F. Martin.....	Newburgh.....	183	Goods sold.....	None.
Wells, Harcourt & Co.....	Milton.....	423	Goods sold.....	None.
John Hanford.....	Philadelphia.....	108	Money loaned.....	None.
Charles Sparford.....	Poughkeepsie.....	2,500	Money loaned.....	None.
Henry Hart & Co.....	Meriden, Conn.....	273	Money loaned.....	None.
Cornelius Moon.....	Marlborough.....	3,160	Note indorsed and paid.....	None.
Julius N. Scott.....	Newburgh.....	120	Note indorsed and paid.....	None.

RECAPITULATION.

Debts and liabilities amount to.....	\$20,461 00
Assets nominally worth.....	25,880 00
Assets actually worth.....	14,500 00

In the Matter of the Assignment of
Cornelius Martin to James H. Ever-
ett for the benefit of creditors.

ULSTER COUNTY, ss.:

Cornelius Martin being sworn, says that he is the assignor named in the above assignment, which bears date the 14th day of July, 1885, recorded in the office of the clerk of the county of Ulster the 15th day of July, 1885; that the inventory and schedules hereto annexed contain a true and full account of all the creditors of said deponent, the last known place of residence of each creditor, where the same is known to the deponent and, where the same is not known, the fact is so stated therein. Also, the sum owing to each creditor, and the nature of each debt or demand, whether arising on written security, account or otherwise. Also, the true cause and consideration of such indebtedness in each case. Also, a statement of any existing security for the payment of any such debts. Also, a full and true inventory of all the estate, both real and personal, in law and equity of Cornelius Martin, at the date of said assignment, and the incumbrances existing thereon and of all vouchers and securities relating thereto, and the value of such estate according to the best knowledge of deponent. And deponent further says, that the annexed inventory and schedule are in all respects just and true, according to the best knowledge, information and belief of this deponent.

(Jurat.)

(Signature.)

ADVERTISEMENT FOR CLAIMS.

§ 4. The county judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than thirty days from the last publication thereof, which advertisement or notice shall be published in two newspapers, to be designated by the county judge, as most likely to give notice to the persons to be served, not less than once a week for six successive weeks, and if it appears that any of such creditors are out of the State, then in like manner in the State paper.

(Note the fact that the State paper has been abolished.)

The effect of omission by a creditor to present his claim is prescribed by section 13 of the act, under which he is not entitled to notice of settlement of assignee's account, but in case the assignee is satisfied from the debtor's schedules that the creditor has a valid claim, he is not debarred from sharing in the distribution of the fund in the hands of the assignee, and it is said that this method of giving notice to creditors may be auxiliary to other methods. *Matter of Gilbert*, 9 Daly, 479. In New York city, however, in one

instance, a different rule seems to have been adopted as to including claims not presented in distribution to creditors. See *Matter of Burdick*, 10 Daly, 49. The assignee has no discretion to refuse payment of a preferred claim because it is usurious, and a claim within the statute of frauds is valid against the estate. *Green v. Morse*, 4 Barb. 332; *Chapin v. Thompson*, 89 N. Y. 270; *Matter of McCullum*, 10 Daly, 72; *Matter of Ward*, id. 66; *Livermore v. Northrup*, 44 N. Y. 107. But it is held in *Brown v. Halstead*, 17 Abb. N. C. 197, that the assignee is not required to pay a claim he knows or believes to be wholly fictitious. In *Albert v. Back*, 52 N. Y. Super. 550, affirmed without opinion, 101 N. Y. 656, it was held that where the assignee paid a preferred claim he had every reason to know was fraudulent, and which was afterward declared so, he must be charged with the amount paid. It is said to be otherwise as to usury against a claim not preferred. *Matter of Brown*, 10 Daly, 115. The act by section 26 provides for trial by jury, or before a referee, of any disputed claim arising under the statute. The practice would, doubtless, in such case, be assimilated to that on a reference to try validity of disputed claim out of Surrogate's Court. Where the assignor fails to advertise, he will become liable for any claims overlooked by him. *Matter of Ludington*, 5 Abb. N. C. 307. The assignee cannot be compelled by a mortgagee to pay taxes where they are not preferred by the assignment. *Matter of Lewis*, 81 N. Y. 421.

Precedent for Petition for Order to Advertise for Claims.

ULSTER COUNTY COURT.

In the Matter of the General Assignment of Cornelius Martin to James H. Everett.

To Hon. WILLIAM S. KENYON:

The petition of James H. Everett respectfully shows: That on the 3d day of July, 1885, Cornelius Martin, then residing and now residing at, and who conducted a farm in the town of Ulster, county of Ulster and State of New York, made and executed in due form of law a general assignment to your petitioner for the benefit of his creditors, which said assignment was, on the 3d day of July, 1885, duly recorded in the office of the clerk of the county of Ulster, and on the 6th day of July, 1885, in the office of the clerk of the county of Orange.

That your petitioner has accepted said assignment and given the undertaking required by law, and entered upon the discharge of his duties as assignee under said assignment.

That your petitioner is informed from the inventory and schedules

fled by said Cornelius Martin, that all of the creditors of the said Cornelius Martin reside in the State of New York, in the counties of Ulster and Orange.

Wherefore your petitioner prays that he may be authorized to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, in accordance with the statute in such case made and provided.

Dated *July 28, 1885.*

JAMES H. EVERETT.

(Add verification as to pleading.)

Precedent for Order to Advertise for Claims.

(Caption in usual form.)

(Title.)

On reading and filing the petition of James H. Everett, verified on the 28th day of July, 1885, and on application of S. T. Hull, attorney for said petitioner, it is

Ordered, that the prayer of said petitioner be and the same is hereby granted, and the said James H. Everett is hereby authorized to advertise for creditors of Cornelius Martin to present their claims, with the vouchers therefor, duly verified, on or before a day to be specified in said advertisement, not less than thirty days from the last publication thereof, which said advertisement or notice shall be published once in each week for six successive weeks, in the *Kingston Daily Leader*, a newspaper published in the city of Kingston, Ulster county, and in the *Newburgh Journal*, a newspaper published in the city of Newburgh, Orange county.

Dated *July 28, 1885.*

WM. S. KENYON,
County Judge of Ulster County.

Precedent for Notice to Present Claims.

In pursuance of an order made by the Hon. Wm. S. Kenyon, on the 28th day of July, 1886, notice is hereby given to all the creditors and persons having claims against Cornelius Martin, lately doing business in the town and county of Ulster, under the name of Cornelius Martin, that they are required to present their claims, with the vouchers therefor, duly verified, to the subscriber, the duly appointed assignee of the said Cornelius Martin, for the benefit of his creditors, at his place of business, No. 123 Washington avenue, in the city of Kingston, on or before the 10th day of October, 1886.

S. T. HULL,

Attorney for Assignee.

JAMES H. EVERETT,

Assignee.

BOND OF ASSIGNEE.

§ 5. The assignee named in any such assignment shall, within thirty days after the date thereof and before he shall have any power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the State of New York in an amount to be ordered and directed by the county judge of the county where the assignment is recorded, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee and for the due accounting for all moneys received by him, which bond shall be filed in the clerk's office of the

county where such assignment is recorded, but in case the debtor shall fail to present such inventory within the twenty days [required, then the assignee, before the ten days thereafter shall have elapsed, may apply to the county judge by verified petition for leave to file a provisional bond until such time as he may be able to present the schedule or inventory as hereinbefore provided.

The assignee takes title to the property on the delivery of the assignment and the filing of the bond is not a condition precedent, and does not affect the validity of the assignment. *Thrasher v. Bently*, 59 N. Y. 649; *Produce Bank v. Morton*, 67 id. 194; *Brennan v. Wilson*, 71 id. 502; *Bostwick v. Bennett*, 74 id. 317; *Matter of Farnam*, 75 id. 187; *Warner v. Jaffray*, 96 id. 248; *Ryan v. Webb*, 39 Hun, 435. But until the bond is filed the assignee cannot execute his trust and cannot convert or convey the property. *Woodworth v. Seymour*, 22 Hun, 245. Reargument denied, 23 id. 147; *Van Hein v. Elkus*, 8 id. 516; *Brennan v. Wilson*, 71 N. Y. 502. The validity of the assignment is not affected by failure to file a bond; when the assignee, after giving a bond, ratifies his acts in leasing property before filing the bond, they are made valid. *Smith v. Newell*, 32 Hun, 501. The bond in the city of New York must be approved by a judge of the Court of Common Pleas. So held before the act of 1885. *Matter of Robinson*, 10 Daly, 148. Under Laws 1860, chapter 348, section 3, the bond required from an assignee might be either joint, or joint and several. *People v. White*, 28 Hun, 289. The giving of a bond is not a prerequisite to the validity of the assignment, and if the bond when given is void, the assignment is not vitiated. *Thrasher v. Bently*, 1 Abb. N. C. less fully, 59 N. Y. 649; *Ryan v. Webb*, 39 Hun, 435. To the same effect, *Sinclair v. Oakley*, 6 Week. Dig. 513; *Plume, etc., Co. v. Strauss*, 17 Hun, 586; *Worthy v. Benham*, 13 id. 176. But the assignee cannot convey the assigned property, and such conveyance is a nullity which may be questioned not only by the assignor's creditors, but by the assignee's successors. *Woodworth v. Seymour*, 22 Hun, 245.

Precedent for Bond.

Know all men by these presents, that we, Amasa Humphrey, James F. Brower and James S. Winne, all residing in the city of Kingston, are held and firmly bound unto the people of the State of New York in the sum of \$10,000, lawful money of the United States of America, to be paid to the said people; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly, by these presents.

Sealed with our seals.

Dated the 31st day of July, 1884; and,

WHEREAS, John F. Williams has made an assignment of his property in trust to the above bounden, Amasa Humphrey, for the benefit of his creditors, dated the 10th day of July, 1884, recorded on the 10th day of July, 1884, in the office of the clerk of the county of Ulster:

Now, therefore, the condition of this obligation is such that if the above bounden Amasa Humphrey shall faithfully execute and discharge the duties of such assignee, and duly account for all moneys received by him as such assignee, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of (Signatures.) [L. S.]
(Add justification and acknowledgment.)

Indorsed:—"I hereby approve of the within bond, and of the sufficiency of the sureties therein."

Dated August 1, 1884. WILLIAM S. KENYON,
County Judge of Ulster County.

Rights of the assignee upon filing his bond.—The rights and duties of trustees for insolvent debtors, heretofore referred to in connection with insolvent proceedings, seem to be the only guide as to the powers and duties of assignees under the statute, except such rules and regulations as have grown up in connection with the administration of such trusts and as have been sanctioned and approved by the courts. These powers are very general and not limited, except so far as is necessary to protect the property of the insolvent for the benefit of his creditors. Under the provision authorizing suits to be brought by the assignee, it has been held that he can maintain an action for conversion of the debtor's property made before his appointment and against the sheriff for negligence with reference to the assignor's property. *Gillett v. Fairchild*, 4 Den. 80; *Acker v. Witherell*, 4 Hill, 112. Under the clause directing a sale of the property of the assignor, it has been held that the assignee has no discretion even under an order of the court. *Libby v. Rosekrans*, 55 Barb. 202. Questioned, 60 N. Y. 93. *Hackley v. Draper*, 4 T. & C. 614. Under the section authorizing the trustee to redeem property of the assignor, it is said that the effect is the same as if redeemed by the debtor himself. *Phyfe v. Riley*, 15 Wend. 248. These provisions relate entirely to the proceedings therein provided for by statute, and are not, perhaps, strictly applicable to general assignments, but are closely analogous. As to general assignments, it is held that the assignee is not a purchaser for value, and the property of the assignor is subject to the same liens and equities in the hands of the assignee as in the hands of the assignor. *In re Howe*, 1 Paige, 125; *Addison v. Bruckmyer*, 4 Sandf. Ch. 531; *Corning v. White*, 2 Paige, 367; *Schieffelin v. Hawkins*, 14 Abb. 112; *Marine Bank*

v. *Jauncey*, 1 Barb. 486; *Reed v. Sands*, 37 id. 185; *Warren v. Fenn*, 28 id. 333; *Leger v. Bonaffe*, 2 id. 475; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Rust v. Lathrop*, 32 id. 535; *Blydenburgh v. Thayer*, 3 Keyes, 293; *Slade v. Van Vechten*, 11 Paige, 21. The assignee is bound to manage the trust property committed to his care with prudence and diligence. *Jacobs v. Allen*, 18 Barb. 549; *Litchfield v. White*, 7 N. Y. 438; *Matter of Edwards*, 10 Daly, 68; *Matter of Dean*, 86 N. Y. 398; *Higgins v. Whitron*, 20 Barb. 141. He is bound by the terms of the deed from which he derives his authority, and is limited to the powers conferred therein and by law. *Pratt v. Adams*, 7 Paige, 615; *Matter of Davis*, 1 How. (N. S.) 79; *Green v. Morse*, 4 Barb. 332; *Chapin v. Thompson*, 89 N. Y. 270; *Matter of Lewis*, 81 id. 421. He has power under the statute of 1858 to bring suit to set aside a fraudulent transfer by his assignor as a judgment creditor after execution unsatisfied. *Ball v. Slafter*, 26 Hun, 353. In the following cases some of the limitations of his powers are defined. *Small v. Ludlow*, 1 Hilt. 189; *Matter of Adams*, 15 Abb. N. C. 61; *Ridgley v. Johnson*, 11 Barb. 527; *Brennan v. Wilson*, 71 N. Y. 502; *Moir v. Brown*, 14 Barb. 39; *Jones v. Hausman*, 10 Bosw. 168; *Dennistown v. Hubbell*, id. 155; *Carter v. Hammett*, 12 Barb. 253. He has power to employ persons to assist him in the performance of his duties. *Mann v. Whitbeck*, 17 Barb. 388; *Van Dine v. Willett*, 38 id. 319. He may employ the same clerks the assignor had in his employ. *Parker v. Jervis*, 3 Abb. Dig. 449. But as to the manner of conducting the business see *Carman v. Kelly*, 5 Hun, 283. But he cannot give full power to another to act as he himself might do as to the assigned estate. *Small v. Ludlow*, 1 Hilt. 189. In *Nichols v. McEwen*, 19 N. Y. 27, the general character of the trust is discussed, and this case is cited and commented upon in *Matter of Levy's Accounting*, 1 Abb. N. C. 177. Where assignee made payment by mistake, he can compel the person receiving the money to pay it back. *Matter of Morgan*, 99 N. Y. 145. Where the assignors collected a draft after the assignee had as a creditor released his debts, and turned over the assets of the estate to the assignor, the assignee still retains the right to sue to recover the proceeds of the draft. *Stanford v. Lockwood*, 95 N. Y. 882; reversing 16 Week. Dig. 312. They have not, like executors, the power to act separately, but must all act together in case of joint assignees for the purpose of bringing suit, conveying property, or compromis-

ing claims. *Brinkerhoff v. Wemple*, 1 Wend. 470; *Thatcher v. Condee*, 4 Abb. Dec. 387; *Sinclair v. Jackson*, 8 Cow. 544; *Ridgley v. Johnson*, 11 Barb. 527; *Brennan v. Wilson*, 4 Abb. N. C. 79; *Anon v. Gelpcke*, 5 Hun, 245. Even though one become incompetent, the only remedy is removal by the court. *Matter of Wadsworth*, 2 Barb. Ch. 381. But in case of death of one of joint assignees, the trust property vests in the survivor. *Shook v. Shook*, 19 Barb. 653; *Belmont v. O'Brien*, 12 N. Y. 394. An assignee takes the title subject to rights of judgment creditors, and the latter may bring an action to set aside a fraudulent conveyance made by the assignor. *Taft v. Wright*, 2 T. & C. 614; affirmed, 59 N. Y. 656. An assignee must exercise the diligence of a paid agent or provident owner, and is liable for ordinary diligence, or want of such diligence as prudent persons use in their own business. *Matter of Dean*, 13 Week. Dig. 77, Court of Appeals.

The assignee cannot secure a benefit to himself by inducing creditors to accept a percentage and assign to a third person. *Matter of Marquand*, 57 How. 477. An assignee who neglected to collect notes for a long time, and accepted renewals, *held* chargeable with the amount. *Winn v. Crosby*, 52 How. 174. An assignee for the benefit of creditors may avoid a chattel mortgage which is fraudulent as to creditors. *Ball v. Slafter*, 26 Hun, 353.

REMOVAL OF ASSIGNEE. NEW ASSIGNEE. CORRECTING INVENTORY.

§ 6. The county judge shall in the case provided in section three, and may also at any time on the petition of one or more creditors, showing misconduct or incompetency of the assignee, or on the petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, the assignee, surety, and such other person as such judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin such assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction, and orders by attachment; and, upon his discharge upon his own application, such assignee's bond shall be canceled and discharged. The new assignee shall give a bond to be approved as above required. The county judge shall have power, by order, to require or allow any inventory or schedule filed to be corrected or amended, and also to require and compel from time to time supplemental inventories or schedules to be made and filed within such time as he shall prescribe, and to enforce obedience to such orders by attachment.

The Court of Chancery originally had jurisdiction to remove a trustee for cause, and that power then devolved upon the Supreme Court. *People v. Norton*, 9 N. Y. 177; *Wood v. Brown*, 34 id. 337. A breach of his trust of whatever character justifies the

removal of the trustee. *Van Epps v. Van Epps*, 9 Paige, 237. Such as mingling the trust funds with his own funds in case it jeopardizes the fund. *Orphan Asylum v. McCartee*, 1 Hopk. 429; *Deen v. Cozzens*, 7 Robt. 178. Or any refusal to properly perform the duties of assignee. *Matter of Mechanics' Bank*, 2 Barb. 446. Or collusion with assignor as against the interest of the creditors. *Manning v. Stern*, 1 Abb. N. C. 409. The failure of the assignee to file his bond is a ground for removal. *Van Hein v. Elkus*, 8 Hun, 516; *Brennan v. Wilson*, 7 Daly, 59; *Barbour v. Everson*, 16 Abb. 366; *Read v. Worthington*, 9 Bosw. 617; *Hardmann v. Bowen*, 39 N. Y. 276. The assignee will not, however, be discharged without an accounting upon notice to the interested parties. *Matter of Dryer*, 10 Daly, 8; *Matter of Yeager*, id. 7; *Matter of Groencke*, id. 17; *Matter of Horsfall*, 5 Abb. N. C. 289; *Matter of Parker*, 10 Daly, 16. It is held in *Matter of Cohn*, 78 N. Y. 248, that the County Court has under the provisions of this section, full power in the matter of removal of assignee for misconduct and incompetency, as was exercised by a court of equity, and that these two grounds are the only ones upon which an assignee can now be removed under the statute.

It seems that if an assignee in a proper case refuses to proceed and bring in the assigned property, the creditors collectively, or one in behalf of all, may join to compel the execution of the trust in equity, or cause the removal of the assignee, and appointment of another. In either case, however, a decree for a single debt would be erroneous. The decree must follow the assignment, and the fruits of a recovery be distributed according to its terms. *Crouse v. Frothingham*, 97 N. Y. 105, reversing 27 Hun, 123, and distinguishing *Bank v. Leggett*, 51 N. Y. 554. Where an application is made to remove an assignee, application should be made to all the assignors within the State, and such notice as the court may direct to any without the State. *Matter of Cohen*, 2 How. (N. S.) 523. In the *Matter of Henlein*, Abb. Dig. 1885, p. 24, an assignee was removed by Van Hoesen, J., for administering the estate in the interest of the assignors. An assignee who pays as fees to his counsel, moneys of the assigned estate with the understanding that the counsel shall furnish sureties on his bond, and pay what is necessary to procure them, is to all intents and purposes using the assigned estate for the purchase of bondsmen, and should be removed. *Matter of Robinson*, 10 Daly, 148. An assignee who checked out funds of the estate on deposit, and refused to exhibit

his check-book to creditors, or explain what use he made of the funds, *held* guilty of misconduct, which required removal, although no misapplication of the funds was shown. *Matter of Coffin*, 10 Daly, 27. It is not ground for removal that the assignee refused to comply with a request to show all the books in his hands. He may sell the goods at retail if he realizes more than can be obtained otherwise.

That an assignee has disposed of the estate in bulk is not good reason for his removal where it is a fair question whether the price received is not a good one. *Matter of Smith*, 10 Daly, 106. That an assignee is about to pay preferred creditors before maturity while unpreferred creditors threaten an action to set aside an assignment is not good ground for removal. *Matter of Mayer*, 66 How. 106. On petition of creditor an assignee may be removed for fraudulent disposition of assets. *Mulcher v. Abbott*, 1 Law Bull. 54. The power of summary removal conferred on the county judge was intended to be as broad as the exigencies of the case might require and is not less than that possessed by a court of equity. *Matter of Cohen*, 78 N. Y. 248; *Matter of Baily*, 85 id. 629. An assignee who is also a creditor and who exacts releases as assignee as a condition of signing composition is liable to removal. *Matter of Horsfall*, 5 Abb. N. C. 289.

FURTHER SECURITY.

§ 7. The county judge may, upon his own motion, or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee and surety, require further security to be given, whenever in his judgment the security afforded by the bond on file is not adequate.

FAILURE TO FILE BOND.

§ 8. A failure to file any bond required by or under this act, or the acts hereby amended, within the specified time, will not deprive the county judge of his power over the assignee or the trust estate.

It would seem that this section is to be construed with section 5 preventing the assignee from disposing of the assets of the assignor until the filing of the bond, and with section 6 providing for his removal under which the decisions hold that failure to file a bond is sufficient ground for such removal.

ACTION ON BOND.

§ 9. Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied by direction of the county judge in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee.

The provisions of section 1915, Code of Civil Procedure, "Action on a Penal Bond," are applicable to the bond given by a general

assignee under an assignment for the benefit of creditors; and in *Matter of Stockbridge*, 10 Daly, 33, it is held that all creditors entitled to prosecute will be allowed, on application to the court, to bring suit on the bond. The recoveries as to amount are of course limited by the penalty of the bond as set out in the section cited.

DEATH OF ASSIGNEE.

§ 10. In case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice (of not less than eight days) as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee; provided, however, that if such assignee die subsequent to the filing of his bond, and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seems just and proper, appoint another and release such surety.

See *Matter of Grove*, 64 Barb. 526.

ACCOUNTING.

§ 11. A citation may be issued to all parties interested in the estate assigned, as creditors or otherwise, requiring them to appear in court on some day therein specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had, and if no cause be shown, to attend the settlement of such account. The county judge must issue all citations mentioned in this act which must be returnable in court. It may issue a citation on the petition of an assignee at any time after the assignment or on petition of a creditor, or an assignee's surety, or an assignor, at any time after a lapse of one year from the date of such assignment, or where an assignee has been removed and ordered to account as hereinbefore provided.

The provision for an accounting by citation is the usual and expeditious method prescribed by statute for settlement of the assigned estate, but it is held that it is not exclusive of the proceeding by suit in equity. *Converseville Co. v. Hill*, 14 Hun, 609; *Hurth v. Bower*, 30 id. 151. The Supreme Court will not take jurisdiction when proceedings have been commenced under the statute. *Niagara Bank v. Lord*, 331 Hun, 557; *Chipman v. Montgomery*, 63 N. Y. 222. But if made to the County Court the proceeding must be by citation, *Matter of O'Brien*, 16 Week. Dig. 435, which is returnable before the court. *Matter of Davis*, 10 Daly, 31.

It is a special proceeding. *Matter of Thorn*, 10 Daly, 71. Under practice where suit is brought, it is held (*Travis v. Myers*, 67 N. Y. 542) that where different creditors had brought suit for accounting against a general assignee, that proceedings would be stayed in all actions except that first brought, and the creditors compelled to come in and prove their claims against the assigned estate

in that action. And where an action has been brought the court will not grant a citation for settlement under the statute. See, also, *Schuels v. Reiman*, 86 N. Y. 270; *Matter of Cromien*, 10 Daly, 41. And in case of long delay the court will put the assignor to his action, in case he desires an accounting. *Matter of Darrow*, 10 Daly, 141. The assignor cannot defeat an accounting by denying the indebtedness of the assignor to the petitioning creditor. Nor is it available to the assignee to defeat an accounting, that he has given no bond. *Matter of Farnum*, 14 Hun, 159. The proceeding under the statute is, by an order to show cause why the settlement should not be had. *Matter of Cowing*, 26 Hun, 214. Where proceedings were pending to test the validity of the assignment (*In Matter of Bowery National Bank*, 1 Abb. N. C. 404), the court, in its discretion, refused to grant a citation to compel the assignee to account until a decision had been reached in the action. The proceeding is by petition to the court; any creditor verifying his claim may make such petition, and a previous adjudication as to the validity of his claim is not necessary; this may be had on the accounting. *People v. Chalmers*, 1 Hun, 683; *Matter of Farnum*, 14 id. 159.

Precedent for Petition by Creditor for an Accounting.

ULSTER COUNTY COURT.

In the Matter of the Final Accounting of
William T. Humphrey, as General
Assignee of Willard Marsh and James
B. Winne, under a general assign-
ment for the benefit of creditors.

To the County Court of Ulster County:

The petition of Edgar F. Hale respectfully shows:

First. That upon the 21st day of August, 1884, Willard Marsh and James B. Winne, copartners in trade, doing business at and residing at Big Indian, Ulster county, N. Y., under the firm name or style of Marsh & Co., executed, in due form of law, a general assignment for the benefit of creditors, to William T. Humphrey, of Big Indian, N. Y.

That upon the 22d day of August, 1884, the said general assignment was recorded in Ulster county clerk's office, and the said assignee, William T. Humphrey, at the time of the making of said assignment, duly accepted said assignment and trust, and qualified as such assignee, and entered upon the duties of his trust.

Second. That the inventory and schedules, as required by law, were made and filed by the said assignee, within the time required by law, in the Ulster county clerk's office, and that thereafter the said assignee

gave a bond as such assignee for the sum, and approved as required by the statute of this State.

Third. That the claim of your petitioner against the said estate is for \$1,267, for goods, wares and merchandise sold to the said firm of Marsh & Winne prior to the said assignment and within six years last past.

That no part of the said claim has been paid. That the said claim against the said estate was duly verified and presented to the assignee.

Fourth. That eighteen months have elapsed since the making and recording of said assignment, and that no account has been filed.

And your petitioner, therefore, prays that a citation may issue out of and under the seal of this court, to all the persons interested in said assigned estate, requiring them to appear in court upon some day to be specified therein, and to show cause why a settlement of the account of the proceedings of the assignee should not be had, and if no cause shown, to attend the settlement of said accounts.

Dated *February 25, 1886.*

EDGAR F. HALE.

(*Add verification as to pleading.*)

Precedent for Petition by Assignee.

(*Title.*)

To the Honorable County Court of Ulster County :

The petition of James H. Everett respectfully shows : That on the 3d day of July, 1885, Cornelius Martin, then doing business in the town of Ulster, said county, and then and now residing in said town of Ulster, made and executed, in due form of law, a general assignment to your petitioner for the benefit of his creditors, which said assignment was, on the same day, duly recorded in the Ulster county clerk's office, and on July 6, 1885, duly recorded in the Orange county clerk's office.

That your petitioner accepted said assignment and entered upon the discharge of his duties thereunder.

That the inventory and schedules required by law were made and filed by your petitioner with William S. Kenyon, county judge of Ulster county, on July 17, 1885, and on the same day duly filed in the Ulster county clerk's office, and that on July 18, 1885, your petitioner made his bond as such assignee, with the sureties required by law, and on July 20, 1885, after the same had been approved by the county judge of Ulster county, the same was duly filed in the Ulster county clerk's office. Such bond being for the faithful discharge of his duties as such assignee, and for the due accounting for all moneys that might come in his hands as such assignee. That upon said bond Anthony Benson and William F. Romer were the sureties. That said William F. Romer has since died, and Myron Teller, of Kingston, and Rogers B. Williams, of Ithaca, are the administrators of the estate of said deceased.

That afterward, and on the 28th day of July, 1885, your petitioner applied for and obtained from Hon. William S. Kenyon, county judge of Ulster county, an order authorizing your petitioner to advertise for creditors to present to him their claims, on or before a day to be therein specified, and that notice was duly published, as provided by said order, and that the time within which claims were to be presented

to your petitioner has expired, and that the following named creditors have presented claims to your petitioner, and are, or claim to be, interested in the distribution of the trust fund created by said assignment. The names and residence of creditors who have presented claims are as follows:

(Here follows creditors, residences and amounts of claims.)

That from the schedules filed as aforesaid, and from other sources, your petitioner has learned of the following other creditors of the assignor.

(Here insert creditors, residences and amounts.)

Wherefore your petitioner prays that a citation may issue out of and under the seal of this honorable court to all persons interested in the said assigned estate, requiring them to appear in court upon some day therein to be specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had; and if no cause be shown, to attend the settlement of such account.

Dated May 28, 1886.

JAMES H. EVERETT.

(Add verification as to pleading.)

Precedent for Order for Citation.

(Caption usual form.)

(Title.)

On reading and filing the petition of James H. Everett in the above matter, verified May 28, 1886, and on application of S. T. Hull, of counsel for said petitioner, it is

Ordered, that a citation issue herein to all parties interested in the estate assigned by Cornelius Martin to James H. Everett, by a general assignment dated on the 3d day of July, 1885, and recorded on the same day in the Ulster county clerk's office, to appear in court on a day therein to be specified, and to show cause why a settlement of the account of proceeding of the said James H. Everett as such assignee should not be had, and if no cause shown, to attend the settlement of such account.

WILLIAM S. KENYON,
Ulster County Judge.

Precedent for Citation to Attend Accounting.

The People of the State of New York, to all persons interested in the estate assigned by Cornelius Martin to James H. Everett, for the benefit of creditors, as creditors or otherwise:

You and each of you are hereby cited and required to appear in the Ulster County Court, at the chambers of the judge thereof, in the city of Kingston, said county, on the 24th day of June, at ten o'clock in the forenoon of that day, to show cause why a settlement of the account of proceedings of James H. Everett as general assignee of the said Cornelius Martin should not be had, and if no cause be shown to attend a settlement of such account.

[L. s.] Witness, Hon. William S. Kenyon, judge of said court, and the seal of said court, the 29th day of May, 1886.

S. T. HULL,
Attorney for Assignee.

JACOB D. WURTS,
Clerk.

The granting of an order and citation to creditors to attend a final accounting by the county judge, instead of the County Court, is a mere irregularity, which is waived by appearance without objection. *Langford v. Cook*, 23 Week. Dig. 309. An assignee may be required to account upon the application of a creditor, without bringing in all parties interested. *Matter of Coving & Co.*, 13 Weekly Dig. 420. A decree on accounting in New York city should only affect creditors who have been duly notified to produce claims by advertisement and mailing. *Matter of Kahn*, 5 Law Bull. 87. On a decree adjudging that an assignee has in his hands a specified sum, applicable to payment of creditors, does not authorize the docketing of a judgment personally against the trustee as a matter of course; a trustee cannot be charged individually, as for breach of trust, without an opportunity to be heard. *Matter of Jung*, 65 How. 476; *Matter of Rosenback*, 10 Daly, 128. Where the amount is small, leave has been given to the assignee to compromise a disputed claim on the petition and proofs, without a reference. *Matter of Wooster*, 10 Daly, 6. Where an action is pending, leave to compromise will not be given the assignee, where creditors oppose who are preferred, and whose evidence will be available to assignee on the trial. *Matter of Goldschmidt*, 10 Daly, 38. Where proceedings for settlement of an assignee's accounts are pending in the County Court its jurisdiction should not be interfered with by authority of a higher court, unless for a substantial reason; but it seems the Supreme Court will exercise its jurisdiction in a proper case. *Chapman v. Montgomery*, 63 N. Y. 222; *Schuehle v. Reiman*, 86 id. 270; *Niagara Co. Bank v. Lord*, 33 Hun, 57; *Hurth v. Bower*, 30 id. 151. The last case cited holds that where, in case of action for an accounting by a creditor, the cause is referred, the court may prescribe the notice to be given to creditors by the referee. It is not confined to nor obliged to adopt the notice prescribed by the statute. An assignee who has not complied with the rules of Common Pleas, requiring him to mail notices to all creditors, is not in a position to cite parties interested to a final settlement. *Matter of O'Brien*, 16 Week. Dig. 435. It is said in *Matter of McClellan*, 10 Daly, 72, that if an assignment gives a preference to a person the assignor did not owe, though it would be held fraudulent in an action by a creditor, in the absence of objections by creditors, the assignee is bound to pay the claim.

Under an assignment by members of an insolvent copartnership of their individual and copartnership property, if the individual

estate of one of the assignors is more than sufficient to pay his individual debts, an individual creditor is entitled to principal and interest on his claim. *Ex parte Murray*, 6 Paige, 204; *Matter of Duncan*, 10 Daly, 95. Where an assignee for the benefit of creditors has incurred liability for rent in retaining premises occupied by the assignor, the question is whether in so doing he acted as a prudent and cautious man would have acted in his own affairs. *Matter of Edwards*, 10 Daly, 68. The actual value of the property assigned, as stated in the schedule, is *prima facie* the amount with which the assignee is chargeable, and the burden is upon the assignee to show that the value is less, or upon the attacking creditors that it is greater. *Matter of Wolf*, 1 State Rep. 273. There must be an accounting before the assignee and his bond can be discharged. *Matter of Yeager*, 10 Daly, 8; *Matter of Dryer*, id. 8. Where the assignor and the creditors have slumbered for many years on the rights, and the assignee, by reason of the loss of papers and death of many persons, would be put to a great disadvantage in accounting, the court will refuse an application to compel an accounting. In such case the parties will be left to an action. *Matter of Darrow*, 10 Daly, 141. Where the petition is made by a creditor, the fact that the assignee disputes the claim of the creditor is not a ground for denying the application. *Matter of Davis*, 10 Daly, 31. The report of the referee should show proof of service upon creditors, of notice to present claims and of the citation upon the accounting, and who of them appeared on the accounting. *Matter of Phillips*, 10 Daly, 47. A claim was allowed in *Matter of Woodward*, 67 How. 359, where presented too late, on ground that by order of reference, referee could fix time. On a reference on accounting, where the referee is to pass on disputed claims, the burden is on a claimant whose claim is not in schedule, if objected to. *Matter of Jesselson*, 10 Daly, 104. An assignee for benefit of creditors has no right to carry on the business of the assignor, and the trust estate cannot be charged with a loss made by him therein. *Re Accounting of Dean*, 13 Week. Dig. 77. Where business of assignor was carried on by assignee, and it does not appear such continuance was a benefit to the estate, he will not be allowed the expenses thereby incurred. *Matter of Pitchell*, 10 Daly, 102; *Matter of Marklin*, id. 122.

An assignee who continued the business is chargeable with the value of goods if sold at auction less expenses of such sale. *Matter of Rice*, 10 Daly, 1. An assignor is liable for the rent of a store leased to his assignee, in which he allows stock to remain after the

assignment, although the assignee files no bond as required by statute. *Powers v. Carpenter*, 15 Week. Dig. 155. An assignee for benefit of creditors cannot be compelled to perform the unperformed contract of his assignor to deliver goods. *Matter of Adams*, 15 Abb. N. C. 21. An assignee for the benefit of creditors is entitled to have his entire account settled in one accounting which will protect him against all the parties and cannot be called upon to account separately to different creditors. *Baily v. Bergen*, 67 N. Y. 346. On the final accounting all creditors must have notice even though they have signed releases. *Matter of Leurenthal*, 5 Abb. N. C. 304n. The court cannot make an *ex parte* order for the payment by an assignee of moneys alleged to belong to creditors as consignors of the assignor, but all the creditors should have notice, and in such case a reference may be ordered and the creditors may contest. *Matter of Watson*, 3 How. (N. S.) 313. Exceptions to the report of a referee on an accounting must be in writing and specific. *Levy's Accounting*, 1 Abb. N. C. 177. And a reference will only be ordered when all the creditors are brought in. *Matter of Collow*, 5 Abb. N. C. 301. The rule in equity that creditors who did not appear after advertisement and prove their claims before a referee in a suit for an accounting cannot share in proceeds is not applicable to an accounting under the General Assignment Act. *Matter of Currier*, 8 Daly, 119. It is said in the same case that all creditors whose names appear in the schedules with the proper statement of the claims, and whose claims are not contested, are entitled to share in the dividend though the claims are not presented to the assignee. On the other hand, in *Matter of Baily*, 58 How. 446, it is held that a creditor, even though his name appears in the schedule, is not entitled to share in the estate if he has failed to prove his claim. The decree of a county judge upon the final accounting of an assignee is a final judgment within the meaning of section 1340 of the Code, and to perfect an appeal, security must be given as required by section 1341. *Matter of Beckwith*, 15 Hun, 326. An order of the court is necessary to discharge an assignee, *Brennan v. Wilson*, 71 N. Y. 502, and before such discharge the court will see that the rights of all the creditors are protected. *Matter of Horsfall*, 5 Abb. N. C. 289; *Keily v. Dusenbury*, 42 N. Y. Super. 238. An assignee will not be permitted, when discharged, to reconvey the property to the assignee, but he must account; he is a trustee for the creditors. *Matter of Backer*, 3 Abb. N. C. 379; *Matter of Parker*, 5 id. 334;

Brennan v. Wilson, 7 Daly, 59. An assignee must account even after a composition. *Matter of Groencke*, 10 Daly, 17; *Matter of Dryer*, id. 8; *Matter of Yeager*, id. 7; *Matter of Horsfall*, 5 Abb. N. C. 289. It is settled practice of the Court of Common Pleas to grant an order of reference upon the application of an assignee for his discharge. When not preferred the court will not compel the assignee to pay taxes and assessments as debts due the State. *Matter of Lewis*, 9 Daly, 220. See 81 N. Y. 421.

Disputed claim before referee.—The trial of disputed claims by jury or referee, under section 26, is a trial of an issue of fact, and when had before a referee his determination can only be reviewed on appeal from the judgment or decree. *Matter of Figelstock*, 5 Law Bull. 71. A claim for damages for breach of contract by the assignors, whereby claimant lost profits accruing after the assignment, is not provable as a debt against the estate. *Matter of Adams*, 15 Abb. N. C. 61. It seems under the decision in *Iselein v. Henlein*, 16 id. 73, that the assignee may reject a proof of claim on the ground that the claimant had previously taken proceedings in hostility to the assignment. Rule 30 of the general rule of practice is held in the Common Pleas to apply to filing of reports of referees on general assignments, and to exceptions to, and confirmation of such report. *Matter of Scheu*, 10 Daly, 11. Upon an application for the discharge of an assignee and his sureties it must appear that creditors have been advertised for, that a citation to attend the accounting has been issued, and that an accounting has been had. *Matter of Merwin*, 10 Daly, 13; The referee must be sworn unless the oath is waived. Section 1016, Code of Civil Procedure applies. *Matter of Vilmar*, 10 Daly, 15. The duty of an assignee is to uphold the trust, not impeach it; he cannot object to the payment of a creditor preferred in the assignment on the ground that the preference is fraudulent. *Matter of Ward*, 10 Daly, 66. A preferred claim must be paid by an assignee for the benefit of creditors though it be usurious. *Matter of Brown*, 10 Daly, 115; following *Chapin v. Thompson*, 89 N. Y. 270.

But by the same authority it seems that the assignee may plead usury as to a claim not preferred. An assignee will not be compelled to allow creditors to inspect stock. If they offer to purchase, the assignee will be held responsible for accepting or refusing the offer. *Matter of Crowder*, 10 Daly, 132.

CITATION.

§ 12. A citation issued on the petition of a creditor may be addressed to and

served on the assignee alone, but on or after the return of such citation the assignee may have a general citation issued to all parties interested

SERVICE OF CITATION.

§ 13. A citation to all persons interested must be served on all parties other than the petitioner who are interested in the fund, including assignors, assignees and their sureties, except that if the time limited by due advertisement for presentation of claims has expired before the issue of the citation, creditors who have not duly presented their claims need not be served. In case the creditors of such assignor, who have proved their claims, exceed twenty-five in number, then the county judge, upon proof by affidavit that such creditors exceed such number, may by order direct such citation to be served on each creditor who has proved his claim, by depositing a copy of the same, at least thirty days prior to the return day thereof, in the post-office at the place where the assignee or assignees, or either of them, reside, duly inclosed and directed to each of such creditors, at his last known post-office address, with the postage prepaid; and by publishing such citation once a week for at least four weeks prior to such return day in one or more newspapers, to be designated by such county judge as most likely to give notice to such creditors.

In order to make service by mail available, it must be pursuant to an order of the court made upon the proof required by the statute.

SERVICE OF CITATION.

§ 14. A citation personally served within the county of the judge or the adjoining county must be so served at least eight days before the return thereof; if in any other county, at least fifteen days before the return thereof.

A party to an accounting who is served with a citation which is not directed to him in any particular capacity will be held to have been brought in both as a creditor and as a surety on the assignee's bond. *Langford v. Cook*, 23 Week. Dig. 309.

SERVICE BY PUBLICATION.

§ 15. The county judge may direct service to be made by publication when he is satisfied, by affidavit or verified petition, either that the person to be so served is unknown, or that his residence cannot, after diligent inquiry, be ascertained, or that he cannot, after due diligence, be found within the State. The order for such service must direct service of the citation upon such person to be made by publication thereof in one newspaper, to be designated by the county judge as most likely to give notice to the person to be served; and also, if it appear that any such person resides without the State, then in the State paper for such length of time as he may deem reasonable, not less than once a week for six weeks, and that a copy of the citation be forthwith deposited in the post-office, duly inclosed and directed to each person so served, at his last known place of residence or post-office address, and the postage paid thereon, at least thirty days before the return day thereof. (Note that State paper is abolished.)

PERSONAL SERVICE WITHOUT THE STATE.

§ 16. When publication has been ordered, personal service without the State made if within the United States at least thirty days, or without the United States, at least forty days before the return day, is equivalent to publication and mailing.

SERVICE ON MINORS, ETC.

§ 17. Personal service upon minors and persons incompetent shall be made in the manner prescribed by law for the service of citations issued by a surrogate, in cases of final accounting.

ON JOINT CREDITORS.

§ 18. Personal service upon one of two or more creditors who claim as copartners or otherwise as joint creditors shall be equivalent to personal service on all, and voluntary appearance, either in person or by attorney, shall be equivalent to personal service.

APPEARANCE WITHOUT SERVICE.

§ 19. On the return of a citation to all parties interested, any person claiming an interest, although not served, may appear and become a party on duly presenting his claim.

POWER OF COUNTY COURT ON ACCOUNTING.

§ 20. On a proceeding for an accounting under this act, the County Court shall have power:

1. To examine the parties and witnesses on oath in relation to the assignment and accounting, and all matters connected therewith, and to compel their attendance for that purpose, and their answers to questions and the production of books and papers.

2. To require the assignee to render and file an account of his proceedings and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account.

3. To take and state such account, or to appoint a referee to take and state it; and such referee shall have the powers enumerated in subdivision one of this section.

4. To settle and adjudicate upon the account and the claims presented, and to decree payment of any creditor's just proportional part of the fund, or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper.

5. To discharge the assignee and his surety at any time, upon performance of the decree, from all further liabilities upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement.

6. On proof of a composition between the assignor and his creditors, to discharge the assignee and his sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor; provided, however, that if there be any creditors not assenting to the composition, the court shall determine what proportion of the fund shall be paid to or reserved for creditors not assenting, which shall not be less than the sum or share to which they would be entitled if no composition had been made, and may decree distribution accordingly.

7. To adjourn the proceedings from time to time, issue further citations if necessary, and amend the petition and proceedings thereon before decree in furtherance of justice.

8. To punish as for a contempt any disobedience or violation of any order made or process issued in pursuance of this act or the acts hereby amended, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the

court, and to take bail to secure the attendance of such party or witness, to be prosecuted under the order of the court in case of forfeiture by and for the benefit of the party in whose interest such examination shall be ordered.

9. To exercise such other or further power in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator

The account, when filed, may be passed upon by the court or sent to a referee; the former is the usual practice outside New York city, but the Court of Common Pleas sends the matter to a referee to take and state the account.

Liabilities of the assignee.—Trustees under a void assignment must account for the proceeds of the property, with interest, less their commissions and charges. *Norton v. Squire*, 16 Johns. 225. The trustee cannot be credited for expenses of an action, by assignor, which did not relate to the trust fund. *Bell v. Holford*, 1 Duer, 58. An indorsement of a note, by an assignee, as such, does not render him personally liable, but only transfers the title. *Bowne v. Douglass*, 38 Barb. 312. If assignees, under a voidable assignment for the benefit of creditors, pay over the proceeds before any creditors obtain a general or specific lien, they are protected. *Wakeman v. Grover*, 4 Paige, 23. They will be protected as to *bona fide* payments made under such circumstances. *Ames v. Blunt*, 5 Paige, 13. Where the assignee has advanced moneys to pay an incumbrance on the assigned property, and the assignment is declared fraudulent, he will be allowed for the moneys so paid out. *Scouton v. Bender*, 3 How. 185. Moneys that have been paid by the assignee in good faith are allowed on accounting, even if assignment void. *Coope v. Bowles*, 42 Barb. 87; *Young v. Brush*, 28 N. Y. 667. Where the assignee has made payments to the assignor, which were for the benefit of the assigned estate, he may be allowed therefor. *Duffy v. Duncan*, 35 N. Y. 187. The decree made upon an accounting, under the statute, binds all creditors, whether they presented claims or not. *Kerr v. Blodgett*, 48 N. Y. 62. The assignee will be allowed the amount of a preferred claim, by him, although the claim was not formally presented. *Matter of Finck*, 10 Daly, 100. Vouchers will be required. *Matter of Marklin*, 10 Daly, 122. An assignee will not be allowed the losses in the business of the assignor, carried on by him, although he may be allowed certain expenses connected therewith. *Matter of Rice*, 10 Daly, 1; *Matter of Orsar*, id. 26; *Matter of Rauth*, id. 52; *Matter of Pitchell*, id. 102; *Matter of Marklin*, id. 122.

As to the practice before referee, a number of cases have been

reported in Common Pleas. It is held (*Matter of Marklin*, 10 Daly, 123) that the fees of the referee must, if objected to, be taxed, and the same rule in *Matter of Schaller*, 10 Daly, 57, and that stipulation as to them is not binding in *Matter of Courier*, 8 Daly, 119. The creditors may, however, consent to the confirmation of referee's report. *Matter of Weinhaus*, 5 Abb. N. C. 355. And as to the formal parts of the referee's report, directions are given in *Matter of Phillips*, 10 Daly, 47, and also id. 57, *supra*.

Precedent for Form of Account.

ULSTER COUNTY COURT.

In the Matter of the General Assignment of Dunwoody Brothers & Vedder, as a firm, and individually, to James H. Everett.

I, James H. Everett, respectfully show to the court: that Foster T. Dunwoody, Charles O. Dunwoody and William O. Vedder, individually, and as composing the firm of Dunwoody Brothers & Vedder, as such firm, and as individuals, all then residing and carrying on business in the city of Kingston, said county, made and executed, in due form of law, a general assignment of their property, as individuals, and as such firm, to me, in trust, for the benefit of their creditors, which said assignment was on the same day duly recorded in the office of the clerk of the county of Ulster, in book of deeds No. 249, page 286.

I accepted the said assignment, and entered upon the execution of the trust thereunder, and took possession of said assigned property. That I duly gave the bond required by law before entering upon the discharge of my duties as such assignee.

That on the 3d day of April, 1884, an inventory of the assigned property, and a schedule of the creditors of the assignors, as required by law, was made and delivered, and filed, both with the county judge of Ulster county and the clerk of the county of Ulster. That by said inventory it appears that the

Liability of said firm was.....	\$15,675 45
Individual liabilities of Charles O. Dunwoody.....	1,265 57
Individual liabilities of Foster T. Dunwoody.....	1,330 15
Individual liabilities of William O. Vedder.....	131 75

That the assets of said firm, as by said inventory, were as follows:

Goods and stock on hand.....	\$11,176 41
Estimated value of debts due firm.....	1,689 67
Property of Foster T. Dunwoody, consisting of interest in real property, estimated at.....	1,350 00
Property of Charles O. Dunwoody, consisting of interest in real property, estimated at.....	1,350 00

That I duly advertised for the presentation of claims against said assignors, such notice to present claims being given under an order of the County Court of Ulster county, granted May 27, 1884.

Schedule A, hereto annexed, contains a statement of all the property contained in said inventory, sold by me at public auction or private sale, with the amount realized therefrom; which sales were fairly made by me at the best prices that could then be had, with due diligence, as I then believed; it also contains a statement of all the debts due the said assignors and mentioned in said inventory, which have been collected, and also of all interest for moneys received by me, for which I am legally accountable.

Schedule B, hereto annexed, contains a statement of moneys paid out by me, and expenses in the settlement of the assigned estate.

Schedule C, hereto annexed, contains a statement of moneys paid out by me to creditors of the assignors under the assignment.

Schedule E, hereto annexed, contains a statement of all claims against the assigned property which have come to my knowledge.

I charge myself:

Amount of inventory, goods, stock, etc...	\$11,176 41	
Less as appears by Schedule A.....	45 37	
Collected on sale of goods, stock, etc.....		\$11,131 04
Accounts, etc., due firm, inventoried.....	\$1,689 67	
Less as appears by Schedule B.....	340 69	
Collected on account, etc.		1,348 98
Real estate of Charles O. and Foster T.		
Dunwoody, as per inventory.....	2,700 00	
Less as appears by Schedule A.....	659 00	
		2,041 00
		\$14,521 02

I credit myself:

Amount of money paid, Schedule B	\$1,191 89	
Amount of money paid, Schedule B	11,007 89	
Amount of my commissions.....	163 03	
		11,262 81
		\$3,258 21

Leaving a balance of three thousand two hundred and fifty-eight and twenty-one one-hundredths dollars to be distributed according to the provision of said assignment.

The said several schedules which are signed by me are part of this account.

Dated *April 25*, 1886.

(Here follow schedules.)

ULSTER COUNTY, ss.:

James H. Everett, of said county, being duly sworn, says that the charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by him to creditors, and for necessary ex-

penses are correct; that he has been charged therein all the interest for moneys received by him and embraced in said account, for which he is legally accountable; that the moneys stated in said account as collected were all that were collected, according to the best of his knowledge, information and belief, on the debts stated in such account at the time of this settlement thereof; that the allowances in said account for the decrease in the value of the assets, and the charges therein for the increase in such value are correctly made, and that he does not know of any error in said account, or any thing omitted therefrom, which may in any wise prejudice the rights of any party interested in said estate; that the sums under twenty dollars charged in the said account for which no vouchers or other evidences of payment are produced, or for which deponent may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged. That the accounts set forth in Schedule A, hereto annexed, are uncollected, and as this deponent believes uncollectible by legal proceedings.

(*Jurat.*)

(*Signature.*)

Order of Reference.
(*Caption usual form.*)

(*Title.*)

A petition having been duly made and filed herein by Abram Benson, praying that an order be granted for a citation to be issued to all persons interested in the estate assigned by Charles Devine to Abram Benson for the benefit of creditors, dated the 7th day of June, 1884, and the said order having been made and entered, and the said citation having been duly issued thereon: Now, on reading and filing the said citation and proof of due notice thereof, on the assignor, assignees and their sureties, and on all creditors whose claims have been duly presented after publication of notice; and the said Abram Benson appearing herein by D. W. Ostrander, his attorney, and having presented his account of his proceedings as assignee of the estate of Charles Devine; and (here insert all appearances and objections to said accounts.)

It is ordered, that it be referred to Howard Chipp, counselor at law, to take and state the accounts of the said assigned estate, with authority to the said Howard Chipp to examine the parties and witnesses on oath, in relation to the said assignment and accounting, and all matters connected therewith, and to compel their attendance for that purpose, and their answers to questions and the production of books and papers.

And it is further ordered, that the said referee take proof and report as to what persons are entitled to share in the distribution of said assigned estate, and in what priority and proportion.

And it is further ordered, that any party to this proceeding, and any creditor may object to any claim presented before said referee, and that the said referee shall thereupon take the proof and report as to the validity of such contested claims.

And it is further ordered, that the said reference proceed at the office of the referee, and that ten days' notice of the time and place of the first hearing be given to all creditors who have presented their claims to said assignee, or who have appeared upon the return of said citation.

(*Signature of Judge.*)

Precedent for Referee's Report on Accounting.

SUPREME COURT.

In the Matter of the Accounting of Lucius Lawson, as Assignee of Elmer E. Stewart, survivor of James E. Stewart & Son, and Elmer E. Stewart.

In pursuance of an order of reference made in the above-entitled proceeding on the 18th day of September, 1886, by which it was referred to me to take and state the accounts of Lucius Lawton, of the estate assigned by Elmer E. Stewart, survivor of James E. Stewart & Son, and Elmer E. Stewart, for the benefit of creditors.

I do respectfully report:

That a notice to proceed before me on said reference was duly served on attorneys for the assignee and creditors, for the 20th day of October, 1886, at my office, 24 John street, Kingston city.

I was attended at said time and place by DeWitt C. Ostrander, Esq., attorney for assignee, and Charles A. Fowler, Esq., attorney for creditors, that the reference was thereupon proceeded upon, and adjourned, from time to time, to the 26th day of November, 1886.

That upon such examination I took the proofs offered by the several parties, which are hereto annexed.

I further report, that in pursuance of an order of Hon. A. B. Parker, dated October 25, 1886, a notice requiring all persons having claims against the said assigned estate to present the same to Lucius Lawson, the said assignee, was duly published as required by said order.

I further report as follows:

First. Said assignee should be charged with the amount of his account as rendered, to-wit, the sum of \$11,182.61.

Second. Said assignee should be charged with the following amounts, which have been collected by him and not charged to his account, to-wit:

Michael Tobin.....	\$1 50
Al. Bonesteel	116 02
Thomas Coman.....	100 00
Thomas Gadd	15 36
Mrs. Toal.....	142 85
Thomas McAuliff.....	13 06
S. A. Van Velser.....	114 02
William Cotta.	120 20
L. Lawson	110 61

\$1,122 62

Which added to assignee's account as rendered..... 11,182 61

\$12,305 23

Which I am of the opinion is the amount of assets which said assignee should be charged with.

Third. I find that the assignee is entitled to credit for disbursements and expenses actually incurred in the care of the trust to the amount of \$261.06. I have deducted from the amount rendered by him in

his statement, and which was filed with me, and is hereto annexed, the item of \$40, marked "incidentals," which I am of the opinion should not be allowed.

Fourth. I find that by deducting credits from disbursements, to-wit: the sum of \$261.06 from \$12,305.23, the amount of assets which said assignee should be charged with, leaves the sum of \$12,044.17 to be paid by and accounted for by said assignee, and which should be distributed among the parties entitled to the same, after deducting the costs and expenses of this proceeding.

Fifth. I further report that the following claims have been proved before me, and I have allowed the same, to-wit:

N. & J. A. Curtis.....	\$122 68
Charles S. Dederick, interest from January 15, 1885...	1,500 00
S. B. Moor & Co., interest from August 8, 1883.....	145 31
Griffeth & Kerr, interest from July 7, 1884.....	159 00
S. F. Myers & Co., interest from January 4, 1883.....	4,000 00
Masten & Hayes, interest from June 1, 1883.....	6,000 00
L. S. Winne & Co., interest from September 2, 1884...	4,000 00
M. N. Cline, interest from May 14, 1884... ..	1,876 24
Making in all the sum of.....	<u>\$17,803 23</u>

Sixth. I find that the claims filed and proved before me by Lucius Lawson, as set forth in inventory of assigned estate, filed in Ulster county clerk's office, on the 27th day of August, 1883, of which said Lucius Lawson claims to be holder and owner, to-wit:

Note dated July 9, 1883, J. E. Stewart & Son. Indorsed, L. Lawson, George B. Merritt, Kingston Nat. Bank.....	\$750 00
Note dated August 11, 1883, State N. Y. Bank, L. Lawson. Indorsed, Elmer E. Stewart, Merritt & Finger..	500 00
Note dated June 26, 1883, First Nat. Bank, Rondout, J. E. Stewart & Son. Indorsed, L. Lawson, Humphrey, Crosby & Ennist.....	435 00
Note dated May 8, 1883, State of N. Y. Bank, J. E. Stewart & Son. Indorsed, L. Lawson, Spencer Ennist.	230 00
Amounting to the sum of.....	<u>\$1,815 00</u>

Should be disallowed, as it appears from the evidence that these claims were paid by Mrs. Frances A. Stewart, widow of James E. Stewart, deceased, and not by said Lucius Lawson.

All of which is respectfully submitted.

Dated *March 29*, 1887.

T. BEEKMAN WESTBROOK,
Referee.

Decree for Distribution.

(Caption usual form.)

(Title.)

Upon the petition of the above assignee, and in pursuance of an order of the court herein, citations were duly issued herein to all per-

sons interested in the assigned estate by Cornelius Martin to James H. Everett, for the benefit of creditors of the said Martin, dated July 3, 1885, to attend the settlement of the accounts of the said James H. Everett as assignee of said estate, which said citation was dated May 29, 1886, and was made returnable June 24, 1886, and due proof of the service of said citation having been made and filed upon the following persons and corporations, viz.: (here insert parties served.)

And the said James H. Everett having appeared and presented his report on such return day, and having filed his vouchers for the payments made by him, and S. T. Hull having appeared on this accounting for said assignee, A. D. Lent, Esq., appearing for R. C. Horton and Mary B. Horton, C. M. Woolsey, Esq., appearing for C. A. Harcourt, and James T. Van Dalfsen, of Peck, Van Dalfsen & Co., appearing in person, and no objections being made to said account, now, on motion of D. W. Ostrander, Esq., of counsel for said assignee, and on reading proofs of service of said citation, the account of the said assignee, and the vouchers accompanying the same, it is ordered, adjudged and decreed:

First. That the account of the said assignee, herewith filed, be and the same is hereby approved and affirmed.

Second. That out of the funds in the hands of the said assignee, as appears by said account, to-wit, the sum of \$3,435.41, he retain for his commissions and expenses the sum of six hundred and fourteen 55-100 dollars; that he pay to S. T. Hull, his attorneys on this accounting, the sum of two hundred and twenty-five dollars; to A. D. Lent, Esq., attorney for C. A. Harcourt, fifteen dollars; to C. M. Woolsey, attorney for R. C. Horton and others, fifteen dollars. That said assignee having paid Caroline F. Smith, the first preferred creditor under said assignment, the sum of \$2,120 in full of such claim, it is further ordered that said payment be approved. And it further appearing that Peck, Van Dalfsen & Co. have been paid by said assignee the sum of \$3,000, and D. H. Sellig the sum of \$1,000, it is further ordered that said payments be approved, and that such several payments be credited upon the distributive shares due said parties severally. And it further appearing that Peck, Van Dalfsen & Co. are now the owners of the paper indorsed by them, and mentioned in the second class of preferences, and that D. H. Sellig is the present owner of the note indorsed by him and mentioned in said class of preferences, it is further ordered that said assignee pay the balance remaining in hand as follows:

That he pay Peck, Van Dalfsen & Co., beyond the payment already made to them, the sum of.	\$920 21
That he pay to D. H. Sellig beyond the payment already made to him the sum of.	857 56
That he pay to C. A. Harcourt the sum of.	852 22

Third. That the assignee do take good and sufficient vouchers for each and every payment so made, and if, after reasonable diligence, any of the persons so entitled to share in said distribution cannot be found, or shall decline or neglect to accept their said share, then the share so belonging to such person shall be deposited in the Kingston National Bank, to the credit of such person.

It is further ordered, adjudged and decreed, that upon compliance with the foregoing provision the said assignee shall, upon presenting due proof of the same to the judge of this court, be entitled to an order relieving him of his liability as such assignee, and releasing the sureties upon the bond by the said James H. Everett as assignee of said estate from all liability upon matters included in the aforesaid accounting, to all creditors who have appeared, and to such creditors who have not appeared after due citation, and to such creditors as have not presented their claims after due advertisement, and that the said application may be made without further notice.

WILLIAM S. KENYON,
Ulster County Judge.

EXAMINATION OF WITNESS, BOOKS, ETC.; WITNESS.

§ 21. The county judge may also at any time, on petition of any party interested, order the examination of witnesses and the production of any books and papers by any party or witness before him, or before a referee appointed by him for such purpose, and the evidence so taken, together with the books and papers, or extracts therefrom, as the case may be, shall be filed in the county clerk's office, and may be used in evidence by any creditor or assignee in any action or proceeding then pending, or which may hereafter be instituted. No witness or party as above provided shall be excused from answering on the ground that his answer may criminate him, but such answer shall not be used in any criminal action or proceeding.

Demand and refusal are not necessary to entitle petition to be made and order granted under this section, and the meaning of "party interested" is substantially those entitled to notice on an accounting. *Matter of Bryce*, 10 Daly, 18. But the granting or refusing the order is discretionary with the court or judge. *Matter of Sweezey*, 10 Daly, 107. It is the duty of the court or judge to pass on the good faith of the application, but the mere fact that the examination may develop facts sufficient to set aside the assignment as fraudulent is not ground for vacating an order. *Matter of Kapelovich*, 22 Week. Dig. 13. Examination has been granted as to ownership of trade-mark and in reference to title deeds. *Matter of Strauss*, 1 Abb. N. C. 402. But the petition must be verified. *Matter of Brown*, 10 Daly, 115. And in any event the examination can only be granted in aid of the assignment. *Matter of Everett*, 10 Daly, 99. The examination of the assignee should not extend to an inquiry as to whether the preferences are fraudulent, or whether there was legal or actual fraud in making the assignment, or in the anterior transactions. *Matter of Rindskopf*, 16 Abb. N. C. 316n; *Schneider v. Altman*, 8 Civ. Pro. 242. The examination is allowed only when in aid of the assignment, and is not authorized merely to show that property has been fraudulently withheld or preferences fraudulently given, and thus to avoid and annul the

assignment. Whoever avails himself of the provisions of the act elects to join in aid of its purpose, which is to bring in and distribute the assigned property according to the terms of the assignment. The judge granting the order must be satisfied that the proposed examination is in good faith, and that the witnesses to be examined have, or the books or papers to be produced contain information pertinent thereto. The discretion of the judge as to the examination cannot be confided to the referee, and he cannot delegate to him the power to compel the production of papers, nor can the referee report his opinion on the evidence. *Matter of Holbrook*, 99 N. Y. 539. But an order for an examination of the assignor and assignee on the application of a creditor is proper, although the examination will incidentally furnish evidence in support of an action to set aside the assignment as fraudulent. *Matter of Wilkinson*, 36 Hun, 134. Examination may be had at any time. It is necessarily confined to cases where a proceeding is pending. *Matter of Bryce*, 10 Daly, 18. An examination cannot be had on allegations of facts tending to show fraud by the assignors in conducting the business previous to the assignment; such a proceeding is in hostility to, not in aid of, the assignment. *Matter of Goldsmith*, 10 Daly, 112; S. C., 15 Week. Dig. 110. The examination should not be ordered unless benefit will result to the assigned estate, but it may be ordered for the purpose of aiding in enforcing the assignment and aiding an action by the assignee. *Matter of Burnett*, 8 Daly, 363; *Matter of Swezey*, 64 How. 353; affirming 62 id. 215; *Matter of Brown*, 10 Daly, 115. An examination, the design of which is to discover evidence which may be used in an action to set aside an assignment as fraudulent, must be had under the Code of Procedure, and cannot be had under the General Assignment Act. *Matter of Rindskopf*, 16 Abb. N. C. 316n. An assignee should allow creditors reasonable opportunity to examine the books of the assignor. *Manning v. Stern*, 1 Abb. N. C. 409. And the court may grant creditors leave to examine the assignor's books by an expert or other person designated by the applicant. *Matter of Isidor*, 59 How. 98; *Matter of Landaur*, 22 Week. Dig. 73. In order that an examination of the books may be granted, facts showing its necessity or propriety must be shown. *Matter of Koons*, 11 Week. Dig. 55.

EFFECT OF ORDERS AND DECREES; CLERK TO KEEP ASSIGNMENT BOOK.

§ 22. All orders or decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed and enforced and appealed from.

the same as if made in an original action brought in the County Court. And all proceedings under this act shall be deemed to be had in court. The said court shall always be open for proceedings under this act. The county judge, when named in this act, shall in such proceedings be deemed to be acting as the court. The clerk of the court shall keep a separate book, in which shall be entered each case, the date and place of record of the assignment, and a minute of all proceedings therein under this act, with such particularity as the court shall direct by general order. He shall record therein at length the orders and decrees of the court settling, rejecting or adjusting claims, and directing the payment of money or releasing assets by the assignee, and removing or discharging the assignee and his sureties and such other orders as the court shall direct by general order. The said clerk shall securely keep the papers in each case in a file by themselves, and shall be entitled to a fee of one dollar for filing all the papers in each case, and entering the proceedings in a minute book, and fifty cents to be paid by the assignee, unless otherwise directed, for recording each order or decree required by this act or the general order of the court.

On a decree under this section judgment cannot be docketed against the assignee personally, *Mutter of Rosenback*, 10 Daly, 128, but must be enforced against the fund; as it is a final order it cannot be enforced by attachment. *Mutter of Stockbridge*, 10 Daly, 33; *Matter of Radtke*, id. 119.

COMPROMISE OF DEBTS.

§ 23. (*As amended, 1885.*) The county judge where the assignment is recorded may, upon the application of the assignee, and for good and sufficient cause shown, and upon such terms as he may direct, authorize the assignee to sell, compromise or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing, upon the final accounting of such assignee, that such debt or claim was fraudulently or negligently sold, compounded or compromised. The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the county judge, and the assignee shall be charged with, and be liable, as part of the trust fund, any sum which might or ought to have been collected by him.

It was said in *Anon. v. Galpcke*, 5 Hun, 245, that in case an assignee act in good faith, he may compromise without the order of the court; and where the amount involved is not large, the application may be made without notice or reference. *Matter of Wooster*, 10 Daly, 6. As to this it may again be said that a reference as to compromise is not usual outside the Common Pleas. The court may order notice to be given creditors, and in case of large interests this is obviously the proper course. *Matter of Younge*, 5 Abb. N. C. 346. But a general power, aside from that conferred by the trust deed, will not be granted the assignee to compromise in his discretion. *Matter of Ransom*, 8 Daly, 89.

*Precedent for Order to Sell Accounts.**(Caption usual form.)**(Title.)*

A citation having been issued herein to all persons interested in the estate assigned by Rudolph Akin to James H. Everett, for the benefit of creditors, dated the 3d day of July, 1885, to attend the settlement of the accounts of the said James H. Everett, as assignee of said estate, which said citation was dated on the 24th day of June, 1886, and was made returnable on the 19th day of July, 1886, and due proof of due service of said citation upon (here recite the services and appearances), and it appearing on the return day of said citation, by the account of the assignee and other proof, that there were a number of accounts of the nominal value of \$1,100, which are of little or no actual value, and which have not been collected after due diligence, and which are wholly or quite uncollectible:

Now, on motion of S. T. Hull, attorney for assignee, he hereby is authorized to sell at public auction, at the front door of the courthouse, in the city of Kingston, the several accounts mentioned in Schedule A, annexed to the account herein, and that he give notice of such sale by publishing a notice thereof daily, at least one week before such sale, in the *Daily Leader*, and by posting hand-bills in at least ten public places in the said city, at least one week before such sale, giving notice thereof.

It is further ordered that these proceedings be, and they hereby are, adjourned to the 3d day of August, 1885, to await the coming in of the report of the said sale of the accounts as aforesaid.

WILLIAM S. KENYON,

County Judge of Ulster County.

*Precedent for Petition for Leave to Compromise.**(Title.)*

To Hon. WILLIAM S. KENYON, *County Judge of Ulster County:*

The petition of Abram Barton respectfully shows: That on the 5th day of June, 1884, Hiram Goodwin, residing at Kingston, and who carried on business at Kingston, Ulster county, made and executed, in due form of law, a general assignment to your petitioner for the benefit of his creditors, which said assignment was, on the 6th day of June, 1884, duly recorded in the office of the clerk of the county of Ulster.

That your petitioner accepted said assignment, and entered upon the execution of said trust.

That among the property so assigned to your petitioner is a certain claim against the firm of Bell, Coons & Co., of the city of Poughkeepsie, amounting, as appears by the schedules filed by the said Hiram Goodwin and from his books, to the sum of \$1,800.

That on or about the 14th day of September, 1884, the said firm of Bell, Coons & Co. failed and suspended business, and have proposed to their creditors a settlement of forty cents on the dollar; that your petitioner has examined into the statement and affairs of said firm; that the total liabilities of said Bell, Coons & Co. amount to \$34,000, and their assets, to the best of deponent's knowledge, do not exceed

the sum of \$15,000, and that the said proposition of settlement appears to your petitioner to be just and fair.

Dated *January 24, 1885.*

ABRAM BARTON.

(*Add verification.*)

Precedent for Order for Leave to Compromise a Debt Due the Estate.

(*Caption usual form.*)

(*Title.*)

Upon reading and filing the petition of Abram Barton, verified on the 24th day of January, 1885, now on application of E. D. Brandow, of counsel for said petitioner, and it appearing to be for the interest of the assigned estate, it is ordered that the said Abram Barton be, and he hereby is authorized to settle and compound the indebtedness of Bell, Coons & Co. upon the receipt of forty per cent of the said indebtedness.

WILLIAM S. KENYON,

County Judge of Ulster County.

PAPERS WHERE FILED, IN NEW YORK; JUDGE TO ACT

§ 24. In the city and county of New York all papers except assignments, which by this act are required to be hereafter filed and recorded in the county clerk's office, shall be filed or recorded in the office of the clerk of the Court of Common Pleas of said city and county; and any judge of said court may exercise all the powers of a county judge for said county for the purposes of this act, and any act or proceeding commenced or returnable before, or instituted or ordered by one of the judges of said court, may be heard, continued or completed by or before any other of them.

JURISDICTION.

§ 25. Any proceeding under this act shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors; and jurisdiction shall be presumed in support of the orders and decrees therein, unless the contrary is shown; and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein.

This section does not enlarge the scope of the jurisdiction of the County Court, but merely to give it general jurisdiction in assignment matters. It has not jurisdiction to order the assignee of a banking firm to pay over proceeds of a draft deposited by a creditor on the ground that it was so deposited for a special purpose. The remedy in such case is by action. *Matter of Witmer*, 40 Hun, 64. The power of the court under this section authorizes an order making a new distribution in case of error, and one who has received a distributive share in excess of his proportion of the fund may be compelled to repay the amount thus overpaid for distribution to those entitled. *In re Morgan*, 21 Week. Dig. 341. The court exercises equity powers under this section. *Matter of Bonner*, 8

Daly, 75. While the assignee is not an officer of the court, he is subject, in all matters relating to the assigned estate, to the order and direction of the court, or a judge thereof. *Matter of Mumford*, 5 State Rep. 303. It is said in *Matter of Manahan*, 10 Daly, 39, that the court is not authorized to grant allowances from the assigned estate to creditors who proceed against the assignee.

TRIAL; FEES AND COSTS; COMMISSION OF ASSIGNEE.

§ 26. The court, in its discretion, may order a trial by jury or before a referee of any disputed claim or matter arising under the provisions of this act or the acts hereby amended. It may, in its discretion, award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this act. The assignee or assignees named in any assignment shall receive for his or their services a commission of five per centum on the whole sum which will have come into his or their hands.

An assignee in trust is entitled to the commissions stipulated in the deed, unless so disproportionate as to indicate fraud. *Hendricks v. Robinson*, 17 Johns. 438. The commissions of an assignee upon a composition are to be calculated upon the aggregate amount of the composition with the expenses incurred by the assignee in addition. He is only entitled to his commissions on moneys actually received, not on property which came into his hands, but where he has received no moneys, the court may direct such compensation as is proper to be made him before turning over the property. It was said in *Levy's Accounting*, 1 Abb. N. C. 177, that the assignee will not be allowed counsel fees in litigations with the assignor over matters not relating to the trust. The assignee cannot be permitted to make such charges for counsel fees and expenses as will unnecessarily deplete the fund. *Matter of Scott*, 53 How. 441. And allowances cannot be granted to counsel for assignee before final accounting out of the assigned estate. The assignee makes such payments on his own responsibility. *Ex parte Thomas*, 5 Abb. N. C. 354. The assignee must prove the propriety and reasonableness of such payments on the accounting. *Matter of Younge*, 5 Abb. N. C. 346. An assignee for benefit of creditors is entitled to the same allowances as a trustee, for expenses necessarily incurred in the execution of the trust. It is said that he cannot be allowed generally for legal advice in the discharge of the trust, but only in case of litigation. *Ex parte Burbank*, 65 How. 129. See, also, *Matter of Wolf*, 1 State Rep. 273. (The rule last laid down is not usually followed, and is probably much more honored in the breach than in the observance.) If the assignee does not faithfully discharge the duties of his trust, his com-

missions may be withheld. *Matter of Coffin*, 10 Daly, 27. Where the assignee is removed for actual misconduct, he is not entitled to commissions. *Matter of Wolf*, 1 State Rep. 273. And it has been held that the court is not bound to allow commissions. *Matter of Rauth*, 10 Daly, 52. This rule is contrary to that held as to executors and administrators. The assignee was held entitled to costs on reference of a disputed claim where the claim was materially reduced. *Olive v. Lockwood*, 9 Daly, 68. In the Common Pleas it is held that neither costs or counsel fees can be allowed out of the fund to any parties except the assignee. *Matter of Currier*, 8 Daly, 119. On confirmation by consent of counsel, no extra allowance will be granted to counsel for assignee. *Matter of Weinhaus*, 5 Abb. N. C. 355.

The costs allowed on an accounting are as those of a successful action. *Matter of Schaller*, 62 How. 40. The sum of \$25 was held a proper charge for drawing an assignment in *Levy's Accounting*, 1 Abb. N. C. 177. And in the same case it was held that where the estate had been recklessly administered, counsel fees would not be allowed the assignee without a specification of the character and necessity of the services. The allowance to assignees and their counsel should not exceed the statutory compensation to executors and administrators, and the value of a given service is said not to be increased by the magnitude of the estate. An assignee who is a lawyer cannot be allowed fees of counsel to advise him unless special complications or difficulty requires. *Matter of Scott*, 53 How. 441. In *Matter of Shaw*, 18 Hun, 195, it was said the commissions of assignees is the same as of executors, but as to this see the language of the present statute fixing five per cent. The fees of referees are the same as in a civil action. *Matter of Fairchild*, 10 Daly, 74. And a stipulation of counsel as to the amount is not binding. *Matter of Currier*, 8 Daly, 119. On trial before referees, costs before and after trial, and extra allowance not exceeding statutory limit, may be allowed. *Matter of Risely*, 10 Daly, 44; *Matter of Fairchild*, id. 74. The assignor may object to the allowance to the assignee, counsel or referee. *Matter of Hulbert*, 9 Abb. N. C. 132; S. C., 10 id. 284. In *Havemyer v. Loeb*, 5 id. 338, the rule as to allowances to assignee for counsel fees, when assignment has been set aside, is said to be laid down in *Platt v. Archer*, 13 Blatchf. 351, which is referred to with approval. An assignee is not acting in hostility to the assignment when he claims that a preferred claim has been paid since the assignment, and should be allowed his coun-

sel fees, although the court does not sustain his claim. *Matter of Schaller*, 10 Daly, 57. It is said in *Matter of Johnson*, id. 123, that counsel fees will only be allowed for such services as the assignee is unable to perform himself, and that no counsel fees, except for preparing the account, will be allowed on accounting, unless the account is litigated. Counsel will not be allowed a general retainer, nor will the assignee be allowed a counsel fee for litigations in which he has involved himself, or for resisting payment of preferred claims before his accounting. *Matter of Van Horn*, 10 Daly, 131. Commissions will not be refused an assignee except in a clear case of fraud or misconduct. *Matter of Rauth*, 10 Daly, 52. The costs of an accounting are ordinarily to be borne by the trust fund, but if the assignee desires to be relieved from the trust for his own convenience he must bear the expenses. *Matter of Edwards*, 10 Daly, 68. No allowance is made to counsel appearing for creditors in Common Pleas, not even to counsel for a petitioning creditor who is successful in obtaining the removal of an assignee. *Moore v. Jenkins*, 5 Law. Bull. 70; *Matter of Watt*, 10 Daly, 11; *Matter of Currier*, 8 id. 119. (This rule, it is believed, is not followed in the County Courts throughout the State, where it is usual to grant reasonable allowances to counsel for creditors; certainly to a petitioning creditor in a case such as is cited.)

Where real property assigned was incumbered by mortgages, and there was no specific direction to the assignees to pay them, and the assignees only charged in their accounts the moneys they actually received in cash for the equity of redemption, they are only entitled to commissions on the cash received, and not on the amount of the mortgages. *In re Woven Tape Skirt Co.*, 85 N. Y. 506; *In re Dean*, 86 id. 399; *In re Hulbert*, 89 id. 259; *Matter of Fulton*, 30 Hun, 258. The latter case distinguishes *Cox v. Schemerhorn*, 18 id. 16, which holds a contrary rule as applied to executors. The fact that counsel for the assignee for benefit of creditors has been paid, for services prior to the accounting, a sum charged in the account does not deprive him of an allowance for services on the accounting. *Matter of Hulbert*, 10 Abb. N. C. 284. In New York city allowances for legal services to assignee are made to assignee and not to counsel. *Matter of Worthley*, 10 Daly, 12. The rule in *Levy's Accounting*, 1 Abb. N. C. 177, that an assignee, himself a lawyer, cannot involve the estate in the expenses of employing counsel to advise him without showing special necessity, was reiterated and applied in *Matter of Burbank*, 65 How. 129.

EXPLANATORY.

§ 27. Whenever words in this act importing the plural number are used in describing or referring to any matters, parties or persons, any single matter, party or person shall be deemed to be included, although distributive words may not be used; and when any single matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters or persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included, unless otherwise specially provided, or unless there be something in the subject or context repugnant to such construction.

REPEAL.

§ 28. Chapter three hundred and forty-eight of the Laws of eighteen hundred and sixty, entitled "An act to secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," and the several acts amendatory thereof, are hereby repealed; but this shall not affect any proceedings had, and any proceedings pending under the acts hereby referred to may be continued under this act.

PREFERENCE TO EMPLOYEES.

§ 29. (*As amended, 1886.*) In all distributions of assets under all assignments made in pursuance of this act, the wages or salaries actually owing to the employees of the assignor or assignors, at the time of the execution of the assignment, shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same *pro rata* to the amount of each such claim.

The omission to make the preference required by this section, does not render the assignment void. *Richardson v. Thurber*, 6 State Rep. 489; 104 N. Y. 606; affirming 39 Hun, 537; *Johnson v. Kelly*, 6 State Rep. 388; *Busley v. Hartson*, 40 Hun, 121; contra, *Harriot v. Masterson*, 38 id. 642; *Roberts v. Tobias*, 1 State Rep. 245; *Smith v. Hartwell*, id. 241.

Order Canceling Bond of Assignee.

(Caption usual form.)

(Title.)

It being made to appear to this court that Amasa Humphrey, the assignee in the above matter, has fully complied with the provisions as to payments required of him by the conditions of the decree herein granted on the 1st day of March, 1886, and the releases and vouchers showing such payments being herewith read and filed: It is, on motion of Julius Armstrong, attorney for said assignee, ordered that the said assignee be and he hereby is relieved and discharged of and from all liability as such assignee, and the sureties on the bond of said assignee, given under the said assignment, be also relieved and discharged from all liability upon matters included in the aforesaid accounting to all creditors who have appeared, and to such creditors as have not appeared, after due citation, and to such creditors as have not presented their claims, after due advertisement.

WM. S. KENYON, *Ulster County Judge.*

CHAPTER 508.

AN ACT to amend chapter four hundred and sixty-six of the Laws of eighteen hundred and seventy-seven, entitled "An act in relation to assignments of the estate of debtors for the benefit of creditors," as amended by chapter three hundred and twenty-eight of the Laws of eighteen hundred and eighty-four, and by chapter two hundred and eighty-three of the Laws of eighteen hundred and eighty-six.

PASSED June 2, 1887; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

SECTION 1. Chapter four hundred and sixty-six of the Laws of eighteen hundred and seventy-seven, entitled "An act in relation to assignments of the estate of debtors for the benefit of creditors," as amended by chapter three hundred and twenty-eight of the Laws of eighteen hundred and eighty-four, and by chapter two hundred and eighty-three of the Laws of eighteen hundred and eighty-six, is hereby amended by adding thereto the following section:

§ 80. In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein (other than for the wages or salaries of employees under chapter three hundred and twenty-eight of the Laws of eighteen hundred and eighty-four, and chapter two hundred and eighty-three of the Laws of eighteen hundred and eighty-six) shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same *pro rata* to the amount of each said preferred claim.

This act was passed so late in the session as to render it impracticable to re-arrange the decisions as to preferences under it.

RULES OF THE COURT OF COMMON PLEAS WITH REGARD TO INSOLVENT ASSIGNMENTS.—ADOPTED DECEMBER 12, 1878.

1. *Duties of the clerk.*—The clerk, in addition to the books now kept by him, shall provide a register and docket.

In the register shall be entered in full every decree and final order made in these proceedings, according to date, and the docket shall contain a brief memorandum of each day's proceedings, according to the respective titles.

The register and docket shall be at all times, during court hours, open for public inspection.

2. Each petition or order or decree filed shall be indorsed with the day and date of such filing, and the papers in each case shall be kept in a file by themselves.

3. No paper shall be permitted to be taken off the files of the court for any purpose except on an order of the court.

4. Every paper filed shall have a brief memorandum indorsed on the outside cover, showing the nature thereof.

5. Copies of any and all papers in these proceedings shall be furnished to any person applying for the same upon the payment of the legal fees.

6. *Process.*—All process, citations, summons and subpoenas shall issue out of the court under the seal thereof, and be tested by the clerk.

7. *Appearances.*—Any party may appear in these proceedings, either by attor

ney or in person. If by attorney, the name of such attorney, with his place of business and residence, shall be indorsed on each and every paper filed by him, and his name shall be entered in the docket.

8. *Schedules.*—The schedule of liabilities and assets required to be filed by the assignor or assignee shall fully and fairly state the nominal and actual value of the assets, and the cause for the difference, and a separate affidavit will be required, which shall fully explain the cause of such difference. If required, the affidavits of disinterested experts as to such value must be furnished.

9. *Signing of.*—Where there may be more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person or persons verifying the same. The sheets of paper on which the schedules are written shall be securely fastened before the filing thereof, and shall be indorsed with the full name of the assignor and assignee, and, when filed by an attorney, shall also be indorsed with his name and business address.

10. *Filing by assignee.*—Should the schedules be filed by the assignee there must be a full affidavit made by such assignee and some disinterested expert showing the nature and value of the property assigned.

11. *Name and residence.*—The name, residence, occupation and place of business of the assignor, and name and place of business of the assignee, may be incorporated in the affidavit or annexed to the schedules.

12. *Recapitulation.*—There shall be a recapitulation at the end of the schedules as follows:

Debts and liabilities amount to.....	\$
Assets nominally worth.....	
Assets actually worth.....	

13. *Contingent.*—Contingent liabilities shall appear on a separate sheet of paper.

14. *Amendments of.*—Application to amend the schedules shall be made by verified petition, in which the amendments sought to be made shall appear in full, and such amendments shall be verified in the same manner as the original schedules were verified.

15. *Bond.*—The bond shall be joint and several in form, and must comply with the requirements of section 812 of the Code of Civil Procedure.

16. *Justification of sureties.*—The court, in its discretion, may require any surety to appear and justify.

17. At least one of such sureties shall be a freeholder. If the penalty of the bond be twenty thousand dollars or over, it may be executed by two sureties justifying each in that sum, or by more than two sureties, the amount of whose justification united is double the penalty of the bond.

18. *Provisional.*—The affidavit on which application is made for leave to file a provisional bond must show fully and fairly the nature and extent of the property assigned, and good and sufficient reason must be shown why the schedules cannot be filed, and it must appear satisfactorily to the court that a necessity exists for the filing of such provisional bond, and for the purposes of this act the affidavit so filed shall be deemed a schedule of the assigned property until such time as the regular schedules shall be filed.

Upon the filing of the schedules the amount of the bond will be determined finally, and should the provisional bond already filed be deemed sufficient, an order will be granted making such bond as provided the final bond.

19. *Assignee.*— Every assignee shall keep full, exact and regular books of account of all receipts, payments and expenditures of money by him, which said books shall always, during business hours, be open to the inspection of any person interested in the trust estate.

20. In making sales at auction, of personal property, the assignee shall give at least ten days' notice of the time and place of the sale of the articles to be sold, by advertisement in one or more newspapers; and he shall give notice of the sale at auction of any real estate at least twenty days before such sale. Upon such sales the assignee shall sell, by printed catalogue, in parcels, and shall file a copy of such catalogue, with the prices obtained for the goods sold, with his final account.

21. When any notice is served on the creditors of the insolvent, pursuant to the provisions of the statute or these rules, by mail, every envelope containing such notices shall have upon it a direction to the postmaster at the place to which it is sent, to return the same to the sender within ten days, unless called for. Upon every application made to the court upon such service, an affidavit shall be presented, showing whether such notices have been returned.

22. Upon an application made for a general citation, the assignee shall file, with his petition, his account, with the vouchers.

23. The assignee must file an account in all cases, which shall be referred to for examination.

On application for leave to compromise a claim due the estate, notice to the creditors may be ordered, and case sent to referee.

Discharge.— No discharge shall be granted an assignee who has not advertised for claims, pursuant to section 4 of the statute and the 30th rule.

No discharge can be granted an assignee and his sureties, in any case, whether the creditors have been paid or have released or have entered into composition or not, except in a regular proceeding for an accounting, under section 20 of the act, commenced by petition for citation, and citation thereon to all persons interested in this estate.

24. *Substituted assignee.*— Whenever an assignee shall have been removed, either on his own petition or on the petition of any person interested in the estate, and another person appointed as assignee in his place and stead, a certified copy of the order made on such petition shall be filed and recorded in the clerk's office of the county wherein the original assignment was recorded, and the clerk of the county shall make such suitable entry, on the margin of the record of the original assignment, as will show the appointment of such substituted assignee, and the said certified copy of the order shall be attached to the original assignment.

25. *Account of assignee.*— The account of the assignee shall be in the nature of a debit and credit statement; he shall debit himself with the assets, as shown in the schedules as filed, and credit himself with any decrease, as well as expenses.

26. The statement of expenditures shall be full and complete, and the vouchers for all payments, other than trivial expenses, shall be attached to the account.

27. The affirmative on the accounting shall be with the assignee, and objections to the account may be presented to the referee, in writing, or be brought out on cross-examination.

28. The testimony taken shall be signed by the several witnesses, and attached to, and filed with, a report of the referee.

29. *Report of referee.*— The report of the referee shall show all the jurisdic-

tional facts necessary to confer power on the court, such as the proper execution and acknowledging of the assignment, the recording of the same, the filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the presenting of the account, and where any items may be disallowed in the account of the assignee, the same shall be fully set out in the report.

30. *Notice to present claims.*—A copy of the notice or advertisement requiring creditors to present their claims must be mailed to each creditor whose name appears on the books of the assignor, with the postage thereon prepaid, at least thirty days before the day specified in such advertisement, and proof of such mailing must be required on the application for a final decree, unless personal service thereof is made upon such creditors.

CHAPTER XII.

POWERS AND DUTIES OF TRUSTEES UNDER THE INSOLVENT ACTS.

The Revised Statutes, by article 8 of the same title defining the practice as to insolvents, and for which the preceding sections are substituted, defined the powers and duties of trustees of insolvents. The Code has re-enacted, substantially, all the statutes to which article 8 refers, except the article as to attachments. This omission renders obsolete some portions of article 8, but its principal features remain operative and must govern in determining the authority of trustees under the insolvent's practice as it now stands. The article is printed at p. 2264, 7th ed.

It first gives the powers conferred generally on trustees, by the court, for the benefit of creditors, and then defines their authority over the assigned estate and method of administration with great minuteness and particularity, and follows with details relating to the distribution of the fund and manner in which trustees may be discharged from their trust. Chapter 158 of Laws of 1846 treats of the same subject-matter. The statute has been judicially construed in a number of cases. As to the power of the court to compel trustees to appoint referees, under section 14, it is held a non-resident debtor may have *mandamus* for that purpose. *Titus v. Kent*, 1 How. 80. But such *mandamus* will be denied after the debtor has, by stipulation, adjourned the hearing, and after evidence has been gone into before the trustees. *Matter of Belknap*, 2 How. 200. If the trustees err in the application of legal principles, the court will correct the error, but on a question of fact their decision must be treated as a verdict. *Matter of Negas*, 7 Wend. 499.

Every creditor who was a creditor at the time of the assignment

and whose demand is existing at the time of the distribution, has a right to exhibit his claim to the trustees, and upon having it allowed, to share in the distribution. *Matter of Coates*, 12 How. 344. A debt due from the debtor for money received by him as executor, but before he qualified, is due from him in his official capacity. *Matter of Faulkner*, 7 Hill, 181. The trustees are entitled to commissions on the amount received by a creditor by a compromise with the debtor, though it did not come to the trustees' hands. *Matter of Bunch*, 12 Wend. 280. A trustee may maintain an action for conversion of personal property of the debtor committed before his appointment. *Gillett v. Fairchild*, 4 Den. 80. To obtain an examination under section 12, of the debtor, his wife, or others, believed to secrete property, legal proof of concealment is not necessary, the proof may be on information and belief. *Noble v. Holliday*, 1 N. Y. 330. The ownership of stock cannot be summarily tried. *Matter of Denney*, 2 Hill, 220. The right of set-off is not confined to liquidated debts, but extends to all mutual credits between the original parties. *Holbrook v. Receivers*, 6 Paige, 220; *Jones v. Robinson*, 26 Barb. 310. The statute is in practice, but little used, since, as is known to every practitioner, it is very rare that one taking proceedings to which it is applicable, has any assets which pass to the assignee. Under the amendment to section 111, Code of Civil Procedure, providing that no person shall be imprisoned for more than three months, and that, at the expiration of that period, the sheriff must release the prisoner, the occasion for bringing into practice the insolvent acts will doubtless be fewer than before, and these and the provisions of the Code on the subject be less resorted to than heretofore. As, however, these matters stand on the statute books, and may be brought into requisition, it has been deemed better to treat of the matters in such a way that, if occasion requires, a complete system will be found at hand.

CHAPTER XIII.

CARE OF THE PROPERTY OF A PERSON CONFINED FOR CRIME.

Under the Revised Statutes, the article for which this provision is a substitute provided for the appointment of trustees of the property of a criminal, only where he was indebted to some person; but the appointment might be made at the instance of "any of the

criminal's relatives, or any relative of his wife," and the application of the property, after the payment of the criminal's debts, is directed to be made to the support of his family. The codifiers give at considerable length their reasons for extending the right to make the application to the persons named in section 2220. They also comment upon the fact that under the Revised Statutes the proceedings were loose, and opened the door to many abuses where the property to be sequestrated was of any considerable amount, which was doubtless owing to the fact that at the date of the enactment it rarely happened that the person convicted of a criminal offense was possessed of much property; such cases being now of more frequent occurrence, the proceeding has been revised so as to secure greater certainty and fairness.

§ 2219. Where a person is imprisoned in a State prison, for a term less than for life, or in a penitentiary or county jail, for a criminal offense, for a longer term than one year, one or more trustees, to take charge of his property, may be appointed, as prescribed in this article, by the County Court of the county, or a superior city court of the city, where he resided at the time of his imprisonment; or, if he was not then a resident of the State, where he is imprisoned.

§ 2220. A petition for such an appointment may be presented by either of the following persons:

1. A creditor of the prisoner.
2. A prisoner's husband, wife or child.
3. One or more of his next of kin, or, where he owns real property, of his heirs presumptive.
4. A relative whom he is bound to support.
5. Any relative or other person, in behalf of his infant child or children.

§ 2221. A creditor of the prisoner, who has a judgment, mortgage, or other security, specified in section two thousand one hundred and fifty-eight of this act, cannot apply for such an appointment, with respect to the debt so secured, unless he appeals to or includes in his petition, the declaration, required by that section from a consenting creditor; which declaration has the same effect as the declaration of a consenting creditor, as therein specified.

§ 2222. The petition must be in writing, and verified by the affidavit of the petitioner, to the effect, that the matters of fact therein stated are true, to the best of the petitioner's knowledge and belief. It must set forth the facts, showing that the applicant is entitled to make the application, and that the application is made to the proper court; the name and residence of each person, who is entitled to make such an application, as prescribed in the last section but one, except the fifth subdivision thereof; and a brief description of the property, real and personal, of the prisoner, and the value thereof. If the applicant is a creditor, and not a resident of the State, he must annex to his petition, the papers specified in section two thousand one hundred and sixty-one of this act. If any of the facts, herein required to be set forth, cannot be ascertained by the petitioner, after the exercise of due diligence, that fact must be stated; and the court may, in its discretion, issue a subpoena, requiring any person to attend and testify, respecting any matter, which, in its opinion, ought to be more fully and certainly set forth.

*Precedent for Petition by Creditor**To the County Court of the County of Ulster:*

The petition of Margaret Haskins, as administratrix of, etc., of John Haskins, deceased, respectfully shows that she was appointed administratrix of the said John Haskins, deceased, on the 10th day of January, 1887, and qualified and entered upon her duties as such administratrix, and that as such administratrix she is a creditor of Patrick Larkin for the sum of \$552.50. That the said indebtedness arose upon a promissory note, a sworn copy of which is hereto annexed, the amount due being for the principal thereof, and interest from July 17, 1885. That the said Patrick Larkin is imprisoned in the State prison at Dannemora for the term of ten years, from the 15th day of April, 1887, under the sentence of the Court of Oyer and Terminer, held in and for the county of Ulster, for the offense of manslaughter, as will more fully appear from the copy of the sentence of conviction of said Patrick Larkin, annexed to and accompanying this petition, duly certified by the clerk of the county of Ulster, under the seal of said Court of Oyer and Terminer. That at the time of his conviction and imprisonment, the said Patrick Larkin resided at the city of Kingston, in the county of Ulster, and that your petitioner resides at the same place aforesaid.

That the wife of said Patrick Larkin is Cornelia Larkin, and his children are Sarah Larkin, Nellie Larkin and Martin Larkin, all residing at the city of Kingston aforesaid, they being the only next of kin and heirs at law of said Patrick Larkin. That there are no other relatives whom he is bound to support. That the names of his creditors are Charles G. Martin, Willis L. Nichols and Thomas C. Sheridan, all residing at said city of Kingston, and Matthew Knapp and Charles M. Peterson, residing at the city of New York.

That the said Patrick Larkin is the owner of a farm of land, situate in the town of Ulster, in said county, and described as follows: (insert description); that he is the owner and holder of the following personal property and securities: (give schedule.)

Wherefore, your petitioner prays the order of this court, appointing one or more fit persons trustees to take charge of the property of the said Patrick Larkin, as prescribed by article 4 of title 1 of chapter 17 of the Code of Civil Procedure.

Dated *May* 11, 1887.

MARGARET HASKINS.

ULSTER COUNTY, ss.:

Margaret Haskins, being duly sworn, says that she is the petitioner named in the foregoing petition subscribed by her, and that the matters of fact therein alleged are true to the best of her knowledge and belief.

MARGARET HASKINS.

(*Add jurat.*)

Annex certified copy of sentence of conviction and affidavit, see next section.

§ 2223. The petition must be accompanied with a copy of the sentence of conviction of the prisoner, duly certified by the clerk of the court by which he was sentenced under the seal thereof; together with an affidavit of the applicant, stating that the person so convicted is actually imprisoned thereunder.

Affidavit of Applicant Showing Imprisonment.

ULSTER COUNTY, ss.:

Margaret Haskins, being duly sworn, says that she is the person petitioning for the appointment of a trustee to take charge of the property of Patrick Larkin, an imprisoned debtor, pursuant to the provisions of the Code of Civil Procedure; that the said Patrick Larkin is now actually confined in the State prison at Dannemora, in this State, under and by virtue of the sentence of conviction for manslaughter, by the Court of Oyer and Terminer, a copy of which is hereto annexed.

(*Jurat.*)

MARGARET HASKINS.

§ 2224. Upon the presentation of the papers, the court may, in its discretion, make an order, either appointing one or more fit persons trustees of the property of the prisoner; or requiring all creditors of the prisoner, and all persons interested in his estate, to show cause, at a time and place specified therein, why such an appointment should not be made. In the latter case, the order must direct the manner of the service thereof, by publication or otherwise.

Order to Show Cause.

At a term of the Ulster County Court held at the chambers of the county judge, in the city of Kingston, on the 14th day of May, 1882:

Present—Hon. William S. Kenyon, *County Judge.*

In the Matter of the Application of
Margaret Haskins for the appointment of a Trustee to take charge
of the property of Patrick Larkin,
an imprisoned debtor.

On reading and filing the petition of Margaret Haskins, dated and verified May 11, 1887, praying for the appointment of one or more trustees to take charge of the property of Patrick Larkin, an imprisoned debtor, and showing that he is imprisoned in a State prison under a ten years' sentence; that he as well as the petitioner were residents of the county of Ulster at the time of such sentence, and giving the names of his relatives, next of kin, and creditors, together with a certified copy of the sentence of conviction thereto annexed, and the affidavit of the applicant that said Larkin is now actually imprisoned under said sentence, and on motion of G. D. B. Hasbrouck, of counsel for said petitioner, it is

Ordered, that all creditors of said Patrick Larkin and all persons interested in his estate show cause at a term of this court, to be held at the chambers of the judge, in the city of Kingston, on the 15th day of June, 1887, at ten o'clock, A. M., of that day, why such trustee should not be appointed according to the prayer of said petitioner. It is further ordered that personal service of a copy of this order be made upon each of the creditors of said Patrick Larkin and all persons interested in his estate, at least ten days before said 15th day of June, 1887.

WM. S. KENYON,

County Judge of Ulster County.

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§ 2225. Upon the return of an order to show cause, made as prescribed in the last section, proof of the service thereof, as required thereby, must first be made; whereupon the court must hear the allegations and proofs of the creditors, and other persons interested in the estate who appear. Where the prisoner is indebted to any person, the court must appoint one or more trustees, unless the persons interested in the prisoner's property pay the debt, or give such security as the court prescribes, for the payment thereof, either absolutely or contingently upon a recovery in an action; in which case, or where the prisoner is not indebted, the court may grant or deny the prayer of the petition, as justice requires.

Order Appointing Trustee on Return of Order to show Cause.

At a term of the Ulster County Court, held at the chambers of the county judge, in the city of Kingston, on the 15th day of July, 1887:

Present—Hon. William S. Kenyon, *County Judge*.

In the Matter of the Application of
Margaret Haskins, for the appoint-
ment of a Trustee to take charge of
the property of Patrick Larkin, an
imprisoned debtor.

On the return of the order to show cause herein granted, on the 14th day of May, 1887, with due proof of personal service thereof on (name persons served), at least ten days before this date: Now, on reading and filing the petition, order and affidavit on which the order to show cause was granted, and it appearing that Patrick Larkin is actually imprisoned in a State prison under a sentence for more than one year, and after hearing D. W. Roosa, Esq., on behalf of the creditor, Charles M. Peterson, no one else appearing:

On motion of G. D. B. Hasbrouck, attorney for the petitioner, it is ordered that Carey S. Connelly, of the town of Esopus, in the county of Ulster, be and he is hereby appointed a trustee of the property of said Patrick Larkin, pursuant to the provisions of article 4 of title 1, chapter 17 of the Code of Civil Procedure.

WILLIAM S. KENYON,
County Judge of Ulster County.

§ 2226. The entry of the order, appointing one or more trustees, and the filing of the papers upon which it was granted, vest in the trustee or trustees all the right, title and interest of the prisoner, in and to any property, real or personal. Where the prisoner owns real property, an exemplified copy of the order must be recorded, in the proper office for recording deeds, in each county where the real property is situated.

§ 2227. Upon the application of any person, entitled to apply for an order, appointing trustees of the prisoner's property, and upon such a notice as the court prescribes, to the petitioner, and to such other persons interested, as the court thinks proper to designate, the court, by which the order was granted, may, in its discretion, remove any trustee, and appoint another in his place; or may appoint one or more additional trustees. The new trustee or trustees, so appointed, have the same power and authority, are vested with the same right, title, and interest, and are subject to the same duties and liabilities, as if he or they had been appointed by the original order.

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§ 2228. After deducting their commissions and expenses, allowed by law, and paying the prisoner's debts, the trustees may, from time to time, under the direction of the court by which they were appointed, apply the surplus of any money in their hands, to the support of the prisoner's wife and children, and of such other relatives as he is bound to support, and to the education of his children.

§ 2229. When the prisoner dies, or is lawfully discharged from imprisonment, the trustee or trustees must deliver over to him, or to his legal representatives, all his property, remaining in their hands, after deducting therefrom their lawful expenses and commissions.

§ 2230. This article applies to a prisoner who has been sentenced before this chapter takes effect, and to his property; except where one or more trustees of his property have been theretofore appointed, by proceedings taken in pursuance of a statute then in force.

CHAPTER XIV.

SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF REAL PROPERTY.

This title is a substitute for two articles of the Revised Statutes, the first treating of "forcible entries and detainers," and the second of summary proceedings to recover the possession of land in other cases. The revisers deemed separate and distinct proceedings unnecessary, and have embodied the necessary steps to obtain possession of real estate in a summary manner, in a single statutory enactment. They have also included the substance of a large number of amendatory acts, and much condensed the provisions by amendments to the language used, and the consolidation of similar provisions relating to separate subjects, as well as by the omission of what they deemed superfluous provisions. These proceedings are entirely statutory, and must be conducted in strict accordance with the law. *Miner v. Burling*, 32 Barb. 540; *Coutsworth v. Thompson*, 5 State Rep. 809. The statutory remedy by way of summary proceeding is in derogation of the common-law remedy by action, and must be strictly construed; a peculiar and limited jurisdiction is thereby conferred on certain magistrates, which can be executed only in the way prescribed. *Benjamin v. Benjamin*, 5 N. Y. 385.

§ 2231. In either of the following cases, a tenant or lessee at will, or at sufferance, or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house, or other dwelling, and his assigns, under-tenants, or legal representatives, may be removed therefrom, as prescribed in this title:

1. Where he holds over and continues in possession of the demised premises, or

any portion thereof, after the expiration of his term, without the permission of the landlord.

2. Where he holds over, without the like permission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days' notice in writing, requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owing it, as prescribed in this title for the service of a precept.

3. Where in any city in this State he holds over and continues in possession of the demised premises, or any portion thereof, after default in the payment, for sixty days after the same shall be payable, of any taxes or assessments levied on such demised premises which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held, and a demand for the payment of such taxes or assessments has been made, or at least three days' notice in writing, requiring, in the alternative, the payment thereof, and of any interest and penalty thereon, or the possession of the premises, has been served, in behalf of the landlord, upon the lessee, as prescribed in this title for the service of a precept. An acceptance of any rent by the lessor or his legal representatives shall not be construed as a waiver of the agreement of the lessee to pay taxes or assessments, so as to preclude the lessor from the benefits of this chapter.

4. Where he, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has been adjudicated a bankrupt, under a bankrupt law of the United States.

5. Where the demised premises, or any part thereof, are used or occupied as a bawdy-house, or house of assignation for lewd persons, or for any illegal trade or manufacture, or other illegal business.

The statute applies only where the conventional relation of landlord and tenant exists, not in every case where ownership is in one and possession in another; but only where he who is in possession has, by some act or agreement, recognized the other as his landlord, and assumed the character of a tenant under him, so that he is not at liberty to dispute his title. It must be by agreement and not by operation of law. *People v. Annis*, 45 Barb. 304; *Benjamin v. Benjamin*, 5 N. Y. 383; *Roach v. Cosine*, 9 Wend. 227; *People v. Cushman*, 1 Hun, 73; *Sims v. Humphrey*, 4 Denio, 185; *People v. Bigelow*, 11 How. 83; *People v. Hovey*, 4 Lans. 86; *Livingston v. Tanner*, 14 N. Y. 64; *Doolittle v. Eddy*, 7 Barb. 74; *Keneda v. Gardner*, 3 id. 589; *People v. Simpson*, 37 id. 432; *Evertson v. Sutton*, 5 Wend. 281; *Wright v. Mosher*, 16 id. 454; *People v. Simpson*, 28 N. Y. 55; *Russell v. Russell*, 32 How. 400. A sub-tenant, who holds under an assignee of the original lessee, is liable to be dispossessed for non-payment of rent at the suit of his lessor's subsequent assignee; he cannot gainsay his title. *People v. Angel*, 61 How. 157. The relation of landlord and tenant exists between the lessee, or his assignee, and the assignee or grantor of the lessor, provided such relation existed between the original par-

ties. *Birdsall v. Phillips*, 17 Wend. 473; *Miller v. Levi*, 44 N. Y. 489. A landlord may institute proceedings to recover possession for non-payment of rent, notwithstanding a covenant to pay for improvements at the expiration of the term. *Paine v. Trinity Church*, 7 Hun, 89. Where a tenant holding under one landlord took a lease from another, and surrendered to his first lessor, the latter cannot be dispossessed as the tenant of the second lessor. *Freeman v. Ogden*, 40 N. Y. 105. If a tenant abandons possession before the expiration of his lease, and another immediately takes possession without his privity or consent, no such relation arises as authorizes the lessor to remove him for holding over the term; a verbal declaration, made by the intruder at the time he took possession, that he did so under the former tenant, could not create the relation of landlord and tenant. *People v. Hovey*, 4 Lans. 399. Where a lease is given to commence on the termination of an existing lease, the original lessee cannot be dispossessed by the new one. *Imbert v. Hallock*, 23 How. 456. Where the party in possession had conveyed the fee by a deed, agreeing that he should retain possession till a day fixed, it did not constitute a tenancy. *Sims v. Humphrey*, 4 Den. 85. Nor does a purchaser under an executory contract, under which he is in possession, become a tenant by breach of his contract, so that summary proceedings will lie. *People v. Bigelow*, 11 How. 83.

An agreement to pay for the privilege of putting an office, etc., on a pier does not create the relation of landlord and tenant. *People v. Cushman*, 1 Hun, 73. The tenant must, at the time the proceedings are instituted, hold over under an agreement constituting a tenancy; if he holds over under a new agreement with the landlord, as a contract for purchase, he cannot be dispossessed under the statute. *Burnett v. Scribner*, 16 Barb. 621; *Capet v. Parker*, 3 Sandf. 662.

Where a tenant has been evicted by the landlord from a portion of the premises of substantial value, he cannot be evicted under summary proceedings for non-payment of rent so long as such eviction continues. *People v. Gedney*, 10 Hun, 151. Where a guardian demises a house belonging to his ward, which is on the ward's coming of age conveyed to a third person, the grantee may maintain summary proceedings under the statute. *People v. Ingersol*, 20 How. 316. The landlord's right of re-entry for breach of a condition subsequent cannot be enforced by summary proceedings; he must resort to his action of ejectment. *Penoyer v. Brown*, 2

McCarthy's Civ. Pro. 61. The relation of landlord and tenant exists where the owner agrees that a mortgagee shall occupy the premises till the mortgage is satisfied; on payment after a year, the mortgagor may have summary proceedings. *Hunt v. Comstock*, 15 Wend. 665. And where one goes in possession under an agreement to accept a lease for a specified time and refuses afterward to do so, the relation exists and the party in possession is a tenant at sufferance. *Anderson v. Prindle*, 23 Wend. 616. The proceeding cannot be had where a term expires by forfeiture. *Oakley v. Schoonmaker*, 15 Wend. 226; *Beach v. Nixon*, 9 N. Y. 35. It was formerly held that the relation of landlord and tenant did not exist under an agreement to work a farm on shares. *Oakley v. Schoonmaker*, 15 Wend. 226; *Putnam v. Wise*, 1 Hill, 234; *Wright v. Mosher*, 16 How. 454; *Russell v. Russell*, 32 id. 400. See Subd. 3, § 2232. It does not exist under an agreement for rooms and board although the agreements are for separate sums named. *Wilson v. Martin*, 1 Denio, 602. Nor where a purchaser of real estate under a contract fails to pay according to its terms. *Williams v. Bigelow*, 11 How. 84; *Burnett v. Scribner*, 16 Barb. 622. Nor where a tenant for the life of another holds over after the determination of the life estate. *Livingston v. Tanner*, 4 Kern. 64. If a tenant is holding under a new agreement, he cannot be proceeded against for default in payment of rent, under a previous agreement; nor because he has failed to comply with any of the terms of the former agreement. *Burnett v. Scribner*, 16 Barb. 621; *People v. Swayze*, 15 Abb. 432. A tenancy from year to year is a tenancy for one or more years, such a tenant may be proceeded against at the expiration of any year of his tenancy without notice to quit. *Park v. Castle*, 19 How. 30; *Smith v. Littlefield*, 51 N. Y. 539. Where the agreement is that the lease may be terminated by sixty days' notice, and the tenant refuses to quit after such notice and expiration of the time limited, he may be similarly proceeded against. *Miller v. Levi*, 44 N. Y. 489. A tenant cannot be removed where the landlord has done some act which amounts to an acknowledgment of his right to retain possession. *Wilder v. Embank*, 21 Wend. 587; *Prindle v. Anderson*, 19 id. 391. Summary proceedings will lie to remove the tenant of a furnished house where it is demised at a gross rent. *Armstrong v. Cummings*, 20 Hun, 313; *Singley v. Jones*, 1 City Court, 127. In such a case the furniture is but an incident and the rent issues out of the land only. S. C., 58 How. 33. A person in possession may show that he was formerly the owner and transferred the premises

to the person claiming to be the owner, and took back a lease under a usurious agreement, which was void. The rule, that a tenant cannot dispute his landlord's title does not apply, as the agreement is void. *People, ex rel. Ainslee, v. Howlett*, 76 N. Y. 574. Where tenant occupies after termination of lease with consent of landlord, it is presumed the tenancy continues on same terms as before, and a notice to quit is necessary to terminate the tenancy, but the tenant can be dispossessed for non-payment of rent. *People v. Paulding*, 22 Hun, 91. Where a tenant was allowed to occupy premises without being limited to any term and without any fixed rent being reserved, but only such rent as the occupation was worth, it was held to be a tenancy at will and within the statute. *Sarsfield v. Healy*, 50 Barb. 245. Where there is a tenancy from year to year, the tenant may be evicted after one month's notice to quit, terminating with the year. *Prouty v. Prouty*, 5 How. 81. The proceeding cannot be had for non-payment of rent, where the landlord receives rent due at subsequent quarter. *Anderson v. Prindle*, 23 Wend. 616.

Where the lease provides that on breach of a condition at the option of the landlord, the tenancy shall cease without notice, default in payment of rent does not constitute such a breach as to authorize proceedings without notice. *Beach v. Nixon*, 9 N. Y. 35. The eviction of a tenant by these proceedings for non-payment of rent does not operate to discharge him from the payment of accrued rent. An action for breaches of covenant already incurred is maintainable. *Johnson v. Oppenheim*, 55 N. Y. 280. If a tenant knowingly sublet a portion of the demised premises for an illegal purpose as for a policy shop, the landlord may annul the lease and recover possession by summary proceedings in case the violation of law continues at the time of the institution of the proceeding. *Shaw v. McCarty*, 59 How. 487; *People v. McCarty*, 62 id. 152; *Shaw v. McCarty*, 63 id. 286; *Jones v. Demady*, 2 McCarty's Civ. Pro. 246. The landlord of a licensed innkeeper cannot maintain summary proceedings to enforce a forfeiture, on the ground that the tenant has been guilty of selling liquor on Sunday. The remedy is by ejectment. So held in *Baltmann v. Kindslon*, 2 McCarty's Civ. Pro. 47. Where a demand of the rent has been personally made, no notice in writing is necessary. *Rogers v. Lynds*, 14 Wend. 172; *People v. Gross*, 50 Barb. 231. But the demand, if made, must be made as required at common law. The landlord must demand the precise amount due on the day when due and before sunset, and on the land, and even though no person is found

to pay it to. *Jackson v. Hanson*, 17 Johns. 66; *Wolcott v. Schenck*, 16 How. 449. But a demand of one of two joint tenants or by one of two owners is sufficient. *Geisler v. Acosta*, 9 N. Y. 227; *Griffin v. Clark*, 33 Barb. 46.

Where the tenant has made a general assignment, a demand of the lessee is sufficient. *Bokee v. Hamersley*, 16 How. 461. When it was agreed in a lease, that if intoxicating liquors were sold on the premises, double rent should be paid, and the lessor might dispossess the lessees for non-payment thereof, it was held that if the lessees refused to pay such double rent, they might be dispossessed by summary proceedings. *People v. Bennett*, 14 Hun, 58. Summary proceedings may be had against corporations as well as individuals. *Brown v. Mayor of New York*, 66 N. Y. 385. Where a tenant for one or more years holds over after the expiration of his term, the landlord has the option to treat him as a trespasser, or as a tenant for another year. It is not in the power of the tenant to refuse to be treated as such under such circumstances. *Schuyler v. Smith*, 51 N. Y. 309. A right of dower gives a widow no title under which she can dispossess a tenant. *Weisinback v. Pohalski*, Abbott's Annual, 1884, p. 303. But when a tenant dies leaving a widow, she becomes by operation of law the assignee of her husband's term. If she remains in possession, summary proceedings may be had. *Michensfelder v. Gunther*, 66 How. 464. Where a landlord has a tenant in possession and lets to another, the tenancy of the latter to begin on the day on which that of the former ends, if the tenant in possession wrongfully holds over, the new tenant may institute proceedings to remove him. *Becar v. Flues*, 64 N. Y. 518. And it was held in *Imbert v. Hallock*, 23 How. 456, that the landlord could also maintain the proceeding. Where a tenant dies before the expiration of his term, administration may be necessary before proceedings can be had, but where the term has expired before the death of the tenant, the person in possession may be proceeded against. *Howard v. Ellis*, 4 Sandf. 369. The remedy does not apply to the case of a tenant for the life of another, who continues in possession after the determination of his estate. *Livingston v. Tanner*, 14 N. Y. 64; *Torrey v. Torrey*, id. 430; *Buck v. Binninger*, 3 Barb. 391. Judge McAdam in his work on Landlord and Tenant, at page 622, cites the case of *Ottenger v. Prince*, decided by him in Marine Court, holding that a grantor could by deed and assignment, properly executed, confer upon his grantee all his rights and remedies; and that where the two were

transferred to the same person, he was by force of 1 Edmonds' Revised Statutes, page 698, section 23, put in the place of the grantor; that the grantee could, under such circumstances, recover all in a single action, and there was no good reason why he should split the demand to maintain summary proceedings. Judgment was rendered for the landlord. To authorize the proceeding, the conventional relation must exist. *Livingston v. Tanner*, 14 N. Y. 64; *People v. Simpson*, 28 id. 55; *Putnam v. Wise*, 1 Hill, 234; *Caswell v. Districh*, 15 Wend. 379. The holding over contemplated by statute is that in which the term has expired by lapse of time, not by breach of conditions. *Beach v. Nixon*, 9 N. Y. 35. But this is to be distinguished from a provision which is only a limitation and not a condition. *Miller v. Levi*, 44 N. Y. 489. As to when a lease for a year or for years expires, see *Wilcox v. Woods*, 9 Wend. 346; *People v. Robertson*, 39 Barb. 9; *Chretien v. Doney*, 1 N. Y. 419; *House v. Burr*, 24 Barb. 525. Where a sale has been consummated by a deed, the relation of landlord exists on the part of the purchaser toward tenants of the vendor. *Bostwick v. Frankfield*, 74 N. Y. 207. Not as between master and servant, where servant is furnished a house without rent as part of his compensation. *People v. Annis*, 45 Barb. 304; *Kerrains v. People*, 60 N. Y. 221; *Hayward v. Miller*, 3 Hill, 90; *Miller v. Sisson*, 53 Barb. 258. Nor between tenant in possession and the assignor of his lessee. *People v. Simpson*, 28 N. Y. 55. Payments by a tenant in possession on account of rent to a purchaser at a tax sale at the latter's solicitation, *held* not an attornment of the tenant which would create the conventional relation of landlord and tenant, and authorize the institution of summary proceedings. *Sperling v. Isaacs*, 22 Week. Dig. 174.

Precedent for Notice to Quit.—Non-Payment of Rent.

To JOHN HESS, Tenant.

You will please take notice that you are indebted to me in the sum of \$100 for one month's rent of the premises 350 Washington avenue, in the city of Albany, being rent from July 1st, 1886, to August 1st, 1886; and that I require the payment of said rent on or before the 5th day of August, 1886, or the possession of the premises.

Dated August 2, 1886.

HENRY RUTZER,

Landlord.

§ 2232. In either of the following cases, a person who holds over and continues in possession of real property, after notice to quit the same has been given, as prescribed in section 2236 of this act, and his assigns, tenants, or legal representative, may be removed therefrom, as prescribed in this title:

1. Where the property has been sold by virtue of an execution against him or a person under whom he claims, and a title under the sale has been perfected.

2. Where the property has been duly sold, upon the foreclosure, by proceedings taken as prescribed in title ninth of this chapter, of a mortgage executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected.

3. Where he occupies or holds the property, under an agreement with the owner to occupy and cultivate it upon shares, or for a share of the crops, and the time, fixed in the agreement for his occupancy, has expired.

4. Where he, or the person to whom he has succeeded, has intruded into, or squatted upon, a parcel of land, in a city or incorporated village, without the permission of the person entitled to the possession thereof, and the occupancy, thus commenced, has continued without permission from the latter; or after a permission given by him has been revoked, and notice of the revocation given to the person or persons to be removed.

This remedy may be had not only by the purchaser at the sale under execution, but by his grantee, and the regularity and validity of the proceeding cannot be inquired into, nor whether the purchaser was a *bona fide* purchaser. It is sufficient if the judgment and execution are regular on their face. *Brown v. Betts*, 13 Wend. 29. And the remedy may be had against the person in possession at the time of the sale under title subsequent to the judgment, but the papers must show that the third person so claims title under the execution debtor. *Hallenbeck v. Garner*, 20 Wend. 22; *Birdsall v. Phillips*, 17 id. 464. But the execution debtor may deny the facts upon which the summons issued against him, and is entitled to a jury trial. *Spraker v. Cook*, 16 N. Y. 567. It is no defense, however, that the person proceeded against is a tenant in common of the premises sold; the purchaser acquired all his title, and has a right to be substituted to his possession of the premises. *Brown v. Betts*, 13 Wend. 29.

On summary proceedings by a purchaser of an estate for years, at an execution sale any person may be removed who is in possession under the title acquired by the purchaser; the provisions apply to the judgment debtor, and all holding under him under pretense of title acquired from him. *People, ex rel. Higgins, v. McAdam*, 84 N. Y. 287. The provisions of Code, sections 2951 and 2952, relating to removal of causes from justices' court, where an answer is interposed which raises a question of title to real property, do not apply to summary proceedings for removal of squatter under section 2232, subdivision 4. *Matter of White*, 12 Abb. N. C. 348. To maintain summary proceedings after the sale of a leasehold on execution, the sale must be advertised and conducted as the law requires for a sale of real property. *Mitnacht v.*

Cocks, 65 How. 84. But no irregularity in the judgment on which execution was issued can be inquired into. *Jack v. Cashin*, 1 City Ct. 72; *Getting v. Mohr*, 34 Hun, 340. Where a party is in possession of land by her tenant, and a person setting up a claim to the premises through a tax deed, afterward adjudged invalid, induces the tenant to attorn to him, and enters into possession of the premises, he is an intruder within the meaning of section 2232 of the Code, and may be ejected by summary proceedings. *O'Donnell v. McIntyre*, 2 State Rep. 343; S. C., 1 id. 68; 41 Hun, 100; 9 Civ. Pro. 370; reversing 16 Abb. N. C. 84.

§ 2233. An entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with multitude of people. A person who makes a forcible entry, forbidden by this section, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, undertenants, and legal representatives, may be removed therefrom, as prescribed in this title.

This section gives the remedy by summary proceedings in those cases where, before the Code, the remedy under proceedings for forcible entry and detainer were available. This remedy is much speedier and more simple than the proceeding under the Revised Statutes, now repealed. In *Wood v. Phillips*, 43 N. Y. 152, a forcible entry and detainer was defined, as also in *Porter v. People*, 7 How. 441; *People v. Field*, 52 Barb. 198; *People v. Smith*, 24 id. 16. In an action for forcible entry and detainer, it appearing that in the alleged act of entry no threats of personal violence were used, no unusual weapons displayed, nor any unusual number of persons nor riotous assemblage, it was held that the circumstances of violence and terror necessary to constitute forcible entry were lacking. *Dudley v. Chanfrau*, 2 Edw. Sel. Cas. 128. An injunction to stay summary proceedings should not be granted under the Code of Civil Procedure on appeal from a judgment in a proceeding for forcible entry and detainer, unless in case of allegation of fraud or collusion in the proceedings, or where the magistrate has no jurisdiction. Forcible entry by servants of a railroad company, followed by possession by the company, held to be presumably the act of the corporation or ratified by it. *People v. N. Y. Central R. R. Co.*, 51 N. Y. 623. An owner of land wrongfully held out of possession, may watch his opportunity and if he can regain possession peaceably, may maintain it and resist attempts by the former occupant to retake possession without being liable under the statute for forcible entry and detainer. *Bliss v. Johnson*, 73 N. Y. 529. Where a person is in possession of real estate, even though he be a mere ten-

ant by sufferance, or has not paid his rent, or holds over, the owner can only regain possession by proceeding by process of law. Public policy forbids a resort to violence. *Health Department of New York v. Police Department of New York*, 41 N. Y. Super. 323; affirming 51 How. 157.

In proceedings under the statute, before the Code, for forcible entry and detainer, an affidavit verified in the manner prescribed for pleadings by the Code, was insufficient; such verification is on information and belief, and did not satisfy the statute. The proceedings are summary and liable to technical objections. *People v. Whitney*, 1 T. & C. 533. A mere entry under claim of title without force which could give the prior occupant ground of apprehension or danger from standing in defense of possession, is not a forcible entry or detainer, within the meaning of the statute. *People v. Smith*, 24 Barb. 16; *Willard v. Warren*, 17 Wend. 257. In forcible entry and detainer, the main question is, whether the party entered by force upon one previously having a peaceable possession under claim of right, and whether the person whose possession was invaded has been held out by force. This does not involve the determination of conflicting titles to real estate. *Kelly v. Sheehy*, 60 How. 439. It was held that a person entering under a tax deed and remaining in possession after it has been adjudged void for invalidity in the assessment of the tax is not a "squatter" or "intruder" within the meaning of this section of the statute, which authorizes summary proceedings to remove, for he did not enter without title or legal authority. Title is not an issue in such a proceeding. It is enough for plaintiff to show actual possession at the time when defendant attempted by force to eject plaintiff, and that defendant did by force or fear inspired by force, drive, or keep plaintiff from the premises. *O'Donnell v. McIntyre*, 16 Abb. N. C. 84; reversed, 2 State Rep. 343; 41 Hun, 100. And in *Willard v. Warren*, 17 Wend. 257, it is said, that to constitute a forcible entry and detainer violence is necessary, or some acts tending strongly toward violence in the nature of gestures, menaces, threats, or such demonstrations, as give reasonable ground to apprehend injury in defending the premises. The breaking of the lock on an out-building of plaintiff does not constitute a forcible entry; it must be more than a trespass, and to constitute a forcible entry the same circumstances of violence are requisite, and the keeping in the house, of which possession has been forcibly obtained, a large number of people with weapons, or threats of injury to the person formerly in possession, in case of his return, is a forcible de-

tainer. *People v. Rickert*, 8 Cow. 226. The question of title was not involved in the proceeding under the statute, as now only the right to possession is in question. *Carter v. Newbold*, 7 How. 166. In case of proceedings under the statute for entry into a church, it was held the proceedings should be taken in the name of the corporation and not of the individual trustees. *People v. Fulton*, 11 N. Y. 94. Any person lawfully in possession and excluded therefrom has the benefit of the statute. *People v. Carter*, 29 Barb. 208; *People v. Reed*, 11 Wend. 157; *People v. Van Nostrand*, 9 id. 50. Where one tenant in common had forcibly intruded upon the possession of his co-tenants and been forcibly evicted, he could not have the proceeding. *King v. Phillips*, 1 Lans. 421. The complainant ought in his petition to disclose the nature of his right to the possession, and how, and from whom, it was acquired, so that it may appear that he has the legal right, and an allegation as to his rights, without facts to sustain it, is a legal conclusion. It will not, however, deprive the officer of jurisdiction. *People v. Field*, 52 Barb. 198. It is not necessary that the complainant in forcible entry and detainer should prove himself seized of a freehold or possessed of a term of years; possession is enough. *People v. Van Nostrand*, 9 Wend. 50; *People v. Reed*, 11 id. 157; *People v. Carter*, 29 Barb. 208. The proceeding must be instituted by the person forcibly put out, or forcibly held out of possession, or the guardian of any such person being a minor, and must be prosecuted in the name of the party whose legal right of possession has been invaded. *People v. Fulton*, 11 N. Y. 94. A mere intruder cannot maintain the proceeding, but every person lawfully in possession, and having some right to the possession, and forcibly excluded therefrom, is entitled to the benefit of the statute. *People v. Reed*, 11 Wend. 157. The main question to be determined in questions of this character is, whether the party charged, entered by force upon one having previously a peaceable possession under claim of right, and whether the person whose possession has been invaded, has been held out by force; for no one has a right to assert his own title with force and violence against another in peaceable possession, and under color of title. *Kelly v. Sheehy*, 60 How. 439.

§ 2234. [Amended 1881 and 1884.] Application for removal of a person from real property, as prescribed in this title, may be made to the county judge or special county judge of the county, or a justice of the peace of the city or town, or the mayor or recorder of the city, wherein the real property, or a portion thereof, is situated. Application may also be made, if the property, or a portion thereof, be situated in the city of New York, to the district court of the district

within which the property, or a portion thereof, is situated, or if the justice of such court be for any reason disqualified, to the district court of an adjoining district; if in the city of Brooklyn, to a police justice of that city; if in the city of Albany, or the city of Troy, to a justice of the justices' court of that city; if in the city of Yonkers, to the city judge of that city; if in the cities of Rochester or Buffalo, to a judge of the municipal court of that city. Where the property is situated in an incorporated village, the boundaries of which embrace portions of two or more towns, application may be made to a justice of the peace of either town, who keeps an office in the village.

The following decisions as to the officer before whom proceedings may be taken were made under the Revised Statutes. *People v. Russell*, 19 Abb. 36; *Marry v. James*, 37 How. 52; *Carlisle v. McCall*, 1 Hilt. 399; *Gillilan v. Spratt*, 8 Abb. (N. S.) 13; *People v. Willis*, 5 Abb. 205; *McIntyre v. Hernandez*, 39 How. 121. A comparison of the statute with the Code will at once show their applicability as to the different courts. The following cases relate to jurisdiction of District Courts in New York city, and hold that the demised premises must be within the district in which the judgment was granted. *People v. Campbell*, 60 How. 102; *People v. Kelly*, 20 Hun, 549. Where the affidavit failed to show jurisdiction of justice the proceedings were held void. *Cuyler v. Crane*, 25 Hun, 67. The affidavit must show the premises are situated within the jurisdiction of the officer before whom the proceeding is instituted, or the jurisdiction fails, and recitals in the summons will not cure the defect. *People v. Broadman*, 4 Keyes, 59.

§ 2235. The application may be made by the landlord or lessor of the demised premises; the purchaser upon the execution or foreclosure sale; the person forcibly put out or kept out; the person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement, to cultivate the property upon shares, or for a share of the crops; or the person lawfully entitled to the possession of the property intruded into or squatted upon, as the case requires; or by the legal representative, agent, or assignee of the landlord, purchaser, or other person, so entitled to apply. The applicant must present to the judge or justice a written petition, verified in like manner as a verified complaint in an action brought in the Supreme Court; describing the premises of which the possession is claimed, and the interest therein of the petitioner, or the person whom he represents; stating the facts, which, according to the provisions of this title, authorize the application by the petitioner, and the removal of the person in possession; naming, or otherwise intelligibly designating the person or persons against whom the special proceeding is instituted, and, if there are two or more such persons, and some are under-tenants or assigns, specifying who are principals or tenants, and who are under-tenants or assigns; and praying for a final order to remove him or them accordingly.

A petition not verified is insufficient to confer jurisdiction, and an appearance by the defendant on the return day to hold open the case, when he afterward objects to the jurisdiction, is no waiver of

his rights. *Coatsworth v. Thompson*, 5 State Rep. 809. In case the deed has not been delivered, a landlord, who has contracted to sell premises, may maintain the proceeding. *Miller v. Levi*, 44 N. Y. 489. When one of two joint lessors becomes sole owner of the land, and entitled to the rents by conveyance from the other, he may demand the whole rent, and on refusal dispossess in his own name. *Griffin v. Clark*, 33 Barb. 46. The assignee of the lessor may have the proceeding. *Birdsall v. Phillips*, 17 Wend. 464. Assigns refer to such as hold the entire estate of the landlord in the term demised to the tenant, against whom the proceeding is had. *Imbert v. Hallock*, 23 How. 456. Where a guardian has leased lands of a ward and the ward has become of age and conveyed, his grantor may maintain summary proceedings. *People v. Ingersoll*, 58 How. 351. Where a lessor of premises in part owned by him and in part held by him under lease, at his death devised to his son all his estate, it was held there was sufficient unity of interest and of the right of possession between such son and the executors of his father's estate, to enable them jointly to institute and maintain summary proceedings against the tenant for non-payment of rent. *People v. Dudley*, 58 N. Y. 323; *People v. Stuyvesant*, 1 Hun, 102.

A receiver may maintain the proceedings. *Matter of Renwick*, 1 Law Bull. 19. The affidavit may be made by a sole surviving trustee. *Thresher v. Keteltas*, 2 How. 63.

Contents of petition.—The affidavit must allege facts and not the evidence of facts, nor should matter of law be stated. *Hill v. Stocking*, 6 Hill, 314. It should not be uncertain or contradictory, but make out a plain case. *People v. Matthews*, 43 Barb. 168; affirmed, 38 N. Y. 451; *Wiggins v. Woodruff*, 16 Barb. 474; *Deuel v. Rust*, 24 id. 438; *Hill v. Stocking*, 6 Hill, 314; *Wallace v. Eaton*, 5 How. 99. In order to give the court jurisdiction, it must show that the conventional relation of landlord and tenant exists, created by agreement or recognized by the tenant, and it must also appear from the facts stated, that the term of the tenant has expired, or that, by virtue of the statute, the landlord is entitled to possession. *People v. Simpson*, 28 N. Y. 55; *Russell v. Russell*, 32 How. 400; *Buck v. Binninger*, 3 id. 391; *Deuel v. Rust*, 24 id. 438; *Matter of Robinson*, 1 id. 213; *People v. Matthews*, 38 N. Y. 451. Great particularity is required, and every fact necessary to give the officer jurisdiction must be distinctly stated, or the proceeding will be dismissed. It will be strictly construed as a pleading most stringently against the com-

plainant, and its allegations must not be contradictory. *Wiggins v. Woodruff*, 16 Barb. 474; *Simpson v. Rhinelanders*, 20 Wend. 103; *Prouty v. Prouty*, 5 How. 81. An affidavit, if made by an agent of the landlord, must affirmatively show the fact of such agency, it is not enough to state it by way of recital. *People v. Johnson*, 1 T. & C. 578. It must show, where such notice is necessary, not only that a three days' notice in writing was served, but that it was served in the manner required by law. *People v. Keteltas*, 12 Hun, 67. A petition for removal for holding over in default in payment of rent, which simply alleges that the petitioner has caused at least three days' notice to quit to be served on the tenant without alleging the manner of such service, is insufficient, and where the tenant appears and no proof of service is given on the hearing, the petitioner is not entitled to the order. *Posson v. Dean*, 8 Civ. Pro. 177. It was held in *Brown v. New York*, 66 N. Y. 385, that the omission of the venue in the affidavit is a jurisdictional defect. *People v. De-Camp*, 12 Hun, 378. But where the petition was verified and the signature at end of verification, the omission of signature to petition was held not to be jurisdictional. *Chadwick v. Spargur*, 1 Civ. Pro. 422. If a corporation is landlord, the mayor can make the affidavit. *People v. New York and Troy Steamboat Co.*, 6 Alb. L. J. 26. The affidavit must show that the applicant is entitled to the possession, and that the occupant holds in hostility to his title. *People v. Andrews*, 52 N. Y. 445. The affidavit should show the tenant in possession of the premises, and that he continues in possession "without the permission of his landlord." *Smith v. Huestis*, Hill & Denio, 236; *Rogers v. Wynds*, 14 Wend. 272; *Campbell v. Mallory*, 52 How. 183. It need not state the date or duration of the lease. *People v. Teed*, 48 Barb. 424. But where the proceedings are against different parties, it should distinctly show which are tenants and which are sub-tenants. *Wiggin v. Woodruff*, 16 Barb. 474.

Where the affidavit shows the relation of landlord and tenant was created by a contract of hiring, if the contract is not fully stated in the affidavit, it is sufficient to show the agreement was made between the agent of the landlord and the agent of the tenant, and the default of the tenant. *Estate of Norseworthy v. Bryan*, 33 Barb. 152. The affidavit must give a description of the premises from which it is sought to remove the tenant; it must not be too general or indefinite. *Campbell v. Mallory*, 22 How. 183. Where there is no contract shown on part of alleged tenant, and no rent reserved as

shown by the affidavit, it is insufficient. *Benjamin v. Benjamin*, 5 N. Y. 83. An affidavit alleging in substance that one conveyed the premises to plaintiff on a day named, and defendant, or his assigns, were then in possession as tenants at sufferance and held over, sufficiently states the tenancy. *People v. Ulrich*, 2 Abb. 28. An averment that the amount specified is due for rent, in connection with a statement that defendant holds over and continues in possession of the premises, is sufficient. *People v. Lamb*, 10 Hun, 348. Under a lease, which provides that an assignment without the landlord's consent should terminate the lease, an affidavit that he had assigned, without averring it done without landlord's consent, is insufficient. *Chretien v. Doney*, 1 N. Y. 419. Proceedings were held void where affidavit did not show premises in the jurisdiction of the justice, nor that the affiant was the landlord. *Cuyler v. Crane*, 25 Hun, 67. An affidavit is sufficient if it alleges the making of the lease, the length of the term, the rent, the assignment of the lease to defendants, their occupation, non-payment of rent, and the demand and notice. *People v. Fowler*, 1 Hun, 104, *n.*; appeal dismissed, 55 N. Y. 675. It is not necessary to show that the demand of rent was made by the landlord, it may be made by his agent. *People v. Stuyvesant*, 1 Hun, 102. If the notice of demand for rent is in writing, it must be in the alternative, requiring payment or possession. *People v. Gross*, 50 Barb. 231. Demand by landlord of an under-tenant is not sufficient, it must be made of tenant. *People v. Platt*, 43 Barb. 116. It is incumbent on the landlord to establish, by affidavit, that the rent has become due and payable, that its payment has been demanded, and default made. If it is stated demand was made at tenant's place of business of his agent, it must state who the agent is, or the nature of his agency. *Wolcott v. Schenck*, 16 How. 449. The affidavit should name the person of whom the rent was demanded. *Rogers v. Lynds*, 14 Wend. 172. A lessor is not bound to recognize a general assignee for benefit of creditors, as tenant, and demand of rent may be made of the tenant. *Bokes v. Hammersley*, 16 How. 461. A demand of rent with interest does not invalidate the proceedings. Interest is an incident of the debt, and the landlord is entitled to it from time of default. *People v. Dudley*, 58 N. Y. 323. Where an affidavit has been used in a proceeding in which a verdict was had, it cannot be again used as the foundation for a new proceeding, and if so used, the landlord and judge are liable in trespass. *McCoy v. Hyde*, 8 Cow. 68. In cases of holding over where the real estate has been sold under execu-

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tion, and the party against whom proceedings are instituted holds under the judgment debtor under title subsequent to the lien of the judgment, that fact must distinctly appear in the affidavit. *Hallenbeck v. Gardner*, 20 Wend. 22. Every fact necessary to give jurisdiction should be alleged in the petition. *Hallenbeck v. Gardner*, 20 Wend. 22; *Campbell v. Mallory*, 22 How. 813; *Powers v. Witty*, 42 id. 352. A verification need not be in the exact words of the statute, a substantial compliance is sufficient. *Bowghen v. Nolan*, 53 How. 485.

Form of Petition by Landlord for Non-Payment of Rent on Service of Notice.

To Hon. WILLIAM S. KENYON, *County Judge of Ulster County* :

The subscriber applies for process and proceedings to remove John Doyle, the tenant and occupant of the premises hereinafter described, on the ground set forth in the following petition.

Dated KINGSTON, *May 5*, 1886.

DANIEL GREENE.

STATE OF NEW YORK, }
County of Ulster, } ss.:

The petition of Daniel Greene respectfully shows and alleges, that he is the landlord of the premises hereinafter mentioned, and that, as such, he entered into an agreement with John Doyle, as tenant, and that by the terms of the said agreement the said tenant hired from your petitioner, as such landlord, the four rooms on the first floor in the dwelling situated at No. 47 Harris street, in the city of Kingston, and he, the said tenant, in and by the said agreement, undertook and promised to pay your petitioner, as rent, the sum of \$40 per month, payable monthly in advance, for the use and occupation of said premises; that on the 1st day of May, 1886, there was due, under and by virtue of said agreement, the sum of \$40, for one month's rent of the premises, before described, to-wit: from the 1st day of May, 1886, to the 1st day of June, 1886; and your petitioner further says, that he has demanded the said rent from the said tenant, since the same became due, by the service of a notice in writing upon the said tenant, on the 20th day of May, 1886, pursuant to the statute, requiring the payment of the said rent, so due, as aforesaid, within three days thereafter, or the possession of said premises; and which notice was served upon the said tenant, by delivering to the said John Doyle a copy of such notice, and, at the same time, showing him the original, which said service was made on the premises, at ten o'clock, A. M., on said day; that the said tenant has made default in the payment thereof, pursuant to the agreement under which the premises are held; and that the said tenant holds over and continues in possession of the same, without permission of your petitioner, after default in the payment of the rent as aforesaid. Therefore, your petitioner prays for a final order to remove the said John Doyle from said premises. And your petitioner will ever pray.

Dated KINGSTON, *May 25*, 1886.

DANIEL GREENE.

(*Add verification as to pleading.*)

Precedent for Petition on Expiration of Term.

To Hon. WILLIAM S. KENYON, *County Judge of Ulster County:*

The subscriber applies for process and proceedings to remove Richmond DuBois, the tenant and occupant of the premises hereinafter described, on the grounds set forth in the following petition.

Dated April 1, 1886.

PETER PHILLIPS.

STATE OF NEW YORK, }
County of Ulster, } ss.:

The petition of Peter Phillips respectfully alleges and shows, that he is the landlord of the premises hereinafter described, and that on or about the 1st day of March, 1885, he rented to Richmond DuBois the third floor of premises No. 59 James street, in the city of Kingston, for the term of one year from March 1, 1885, which said term has expired, and that the said tenant holds over and continues in possession of the said premises, without the permission of your petitioner, after the expiration of the tenant's term therein. Therefore, your petitioner prays for a final order to remove the said Richmond DuBois from said premises. And your petitioner will ever pray.

Dated KINGSTON, April 1, 1886.

PETER PHILLIPS.

(Add verification as to pleading.)

Precedent for Petition for Removal of Tenant at Will or Sufferance.

(Application same as above.)

STATE OF NEW YORK, }
County of Ulster, } ss.:

The petition of Mark Van Cott respectfully alleges and shows, that on or about the 1st day of September, 1882, your petitioner let and rented unto Simon Brink, during the will and pleasure of your petitioner, the house and premises known as No. 175 Chambers street in the city of Kingston; and that the said Simon Brink has held and occupied the said premises as the tenant at will of your petitioner, until the expiration of such tenancy as hereinafter mentioned. And your petitioner further alleges that he caused notice in writing to be served on the said Simon Brink (here state the manner of service) on the 1st day of October, 1882, requiring the said Simon Brink to remove from the said premises on or before the 1st day of November, 1882; that the time within which the said Simon Brink was required so to remove has expired; and that the said Simon Brink holds over and continues in possession of said premises after the expiration of such time without the permission of your petitioner, his landlord. Therefore, your petitioner prays for a final order to remove the said Simon Brink from said premises, and your petitioner will ever pray.

Dated KINGSTON, November 2, 1882.

MARK VAN COTT.

(Add verification as to pleading.)

Precedent for Petition by Purchaser at Mortgage Foreclosure.

To the County Court of Ulster County :

The petition of Amasa Humphrey respectfully shows to this court: That on the 14th day of June, 1886, your petitioner became the

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purchaser of the real property hereinafter described at a sale thereof, duly made upon the foreclosure of a mortgage by proceedings taken as prescribed in title 9 of chapter 17 of the Code of Civil Procedure, which said mortgage was dated May 5, 1883, and was executed by John Burns and Julia, his wife, to your petitioner, and described said property; that the title of your petitioner under the said foreclosure has been duly perfected; that said John Burns holds over and continues in possession of said real property after a notice to quit has been given pursuant to section 2236 of Code of Civil Procedure, in behalf of your petitioner, requiring all parties or persons occupying said property to quit the same by the 9th day of February, 1887, which said notice was served personally upon the said John Burns, on the 8th day of January, 1887, and after the perfecting of title as aforesaid.

That your petitioner owns said property in fee. (Insert description.)

Wherefore, your petitioner prays for a final order to remove said John Burns from said real property according to the provision of title 2, chapter 17, of Code of Civil Procedure.

(Dated.)

(Signatures.)

(Add verification as to pleading.)

Petition for Precept for Farm Let on Shares.

To CHARLES M. HADDEN, Esq., *Justice of the Peace in the town of Hardenburgh, in the county of Ulster, New York:*

The petitioner named below hereby applies for process and proceedings to remove Clarence Johnson from the possession of the premises hereinafter mentioned, on the ground set forth in the following petition.

GEORGE GARRISON.

STATE OF NEW YORK, }
County of Ulster, } ss.:

The petition of George Garrison respectfully shows that, at the time of making of the agreement hereinafter mentioned, your petitioner was the owner of the farm known as the "Johnson farm," situate in the town of Hardenburgh, in the county of Ulster, in the State of New York, and described as follows, to-wit (here insert description): That being such owner, your petitioner did on the 1st day of April, 1883, enter into an agreement with Clarence Johnson, whereby said Johnson agreed with your petitioner to cultivate the said property upon shares for the term of one year, which term expired on the 1st day of April, 1884, and that after the expiration of said term, to-wit: on the 4th day of April, 1884, a notice in writing in behalf of your petitioner, requiring all persons occupying the said property, to quit the same on the 15th day of April, 1884, was duly served upon the said Clarence Johnson (here state mode of service), and that notwithstanding the expiration of the time fixed in said agreement, and of the expiration of the term and of the time specified in said notice, the said Clarence Johnson holds over and continues in possession of the said premises without the permission of your petitioner. Wherefore, your petitioner prays for a final order to remove the said Clarence Johnson from said premises, and your petitioner will ever pray.

Dated April 16, 1884.

GEORGE GARRISON.

(Add verification as to pleading.)

Precedent for Petition to Remove Squatters.

To Hon. WILLIAM S. KENYON, *County Judge of Ulster County :*

The subscriber applies for process and proceedings to remove Lawrence Jennings, the tenant and occupant of the premises hereinafter described, on the grounds set forth in the petition.

JAMES BARD.

STATE OF NEW YORK, }
County of New York, } ss. :

The petition of James Bard respectfully alleges and shows, that he is the owner in fee-simple (or state the nature of the estate held by the petitioner) and entitled to the possession of (here describe the property) in the city of Kingston.

Your petitioner further alleges and shows, that Lawrence Jennings did, contrary to law and without the permission of your petitioner, or of anybody authorized to give such permission, intrude into and squat upon the said parcel of land, and that he still squats upon and holds possession of said land and premises without the permission of your petitioner, and has refused and still refuses to remove therefrom.

Your petitioner further shows, that on the 3d day of June, 1886, a notice in writing in behalf of your petitioner, requiring all persons occupying the said property to quit the same on or before the 5th day of July, 1886, has been served upon the said Lawrence Jennings by (here state the mode of service), and that the said Lawrence Jennings holds over and continues in possession of the said property after such notice to quit has been given, and after the expiration of the time therein specified, and refuses to remove therefrom, and that said holding over is without the permission of your petitioner. Wherefore, your petitioner prays for a final order to remove the said Lawrence Jennings from said premises, and your petitioner will ever pray.

Dated KINGSTON, July 6, 1886.

JAMES BARD.

(Add verification as to pleading.)

§ 2236. Where the person to be removed is a tenant at will, or at sufferance, the petition must state the facts, showing that the tenancy has been terminated, by giving notice, as required by law. Where the application is made in a case specified in section 2232 of this act, the petition must state that a notice, in behalf of the applicant, requiring all persons occupying the property to quit the same, by a day therein specified, has been either served personally upon the person or persons to be removed, or affixed conspicuously upon the property, at least ten days before the day specified therein.

CHAPTER 303, LAWS OF 1882.

§ 1. No monthly tenant shall hereafter be removed from any lands or tenements in the city of New York, on the ground of holding over his term (except when the same expires on the first day of May) unless at least five days before the expiration of the term, the landlord or his agent serves upon the tenant, in the same manner in which a summons in summary proceedings is now allowed to be served by law, a notice in writing to the effect that the landlord elects to terminate the tenancy, and that, unless the tenant removes from said premises on the day on which his term expires, the landlord will commence summary proceedings under the statute to remove such tenant therefrom.

The statute requiring notice referred to by this section is 2 R. S. (7th ed.) 1126, § 7: "Whenever there is a tenancy at will or by sufferance, created by the tenant's holding over his term or otherwise, the same may be terminated by the landlord giving one month's notice in writing to the tenant, requiring him to remove therefrom."

Precedent for Form of Notice to Quit in Tenancies at Will or Sufferance.

To HENRY SLATER, tenant:

Please take notice that you are hereby required to quit, surrender and deliver up possession of the rooms on first floor in premises known as No. 243 Crown street, in the city of Troy, and to remove therefrom on the 1st day of May, 1887, pursuant to the provisions of the statute relating to the rights and duties of landlord and tenant.

Dated TROY, April 1, 1887.

MICHAEL HOWARD,
Landlord.

A notice of thirty days, given during a calendar month which contains but thirty days, is held to be a month's notice within the meaning of the statute. *McGuire v. Ulrich*, 2 Abb. 28. The demand of rent may be made by an agent as well as by the landlord himself, and interest thereon may also be demanded at the same time. *People v. Stuyvesant*, 1 Hun, 102; *People v. Dudley*, 58 N. Y. 323. A tenant for a year, holding over, need not be served with a month's notice to quit. He is not within the meaning of the statute a tenant at sufferance. *Rowan v. Lytle*, 11 Wend. 616. Nor is a tenant for life, who holds over after the determination of the life estate, entitled to notice to quit. *Livingston v. Tanner*, 14 N. Y. 64. Tenants from year to year are tenants at will, and one month's notice is sufficient to them as is said in *Wright v. Mosher*, 16 How. 454. And in *Park v. Castle*, 19 id. 30, it is held that such a tenant may be proceeded against without notice, as holding over his term at the expiration of the year. Whenever the holding over has been such, after the expiration of the term and under such circumstances as to indicate consent on the part of the landlord, notice is necessary. *Schuyler v. Smith*, 51 N. Y. 309; *Rowan v. Lytle*, 11 Wend. 616; *Smith v. Littlefield*, 51 N. Y. 539.

Where premises are rented from month to month, a month's notice to quit is not necessary. *People v. Schackno*, 48 Barb. 551; *People v. Goelet*, 64 id. 476. Where a tenant holds for an indefinite period and with no rent reserved, he is a tenant at will; and also where the agreement is specific that he shall quit possession at the demand of the landlord; and therefore a month's notice to quit may

be given in either case. *Nichols v. William*, 8 Cow. 13; *Post v. Post*, 14 Barb. 253; *Sarsfield v. Healy*, 50 id. 245. The notice takes effect thirty days after service, and the naming of a day on which the time will expire less than thirty days after service of the notice does not vitiate it. *Burns v. Bryant*, 31 N. Y. 453. But the notice must be plain and explicit, as well as precise and definite in its terms. *People v. Gedney*, 15 Hun, 475. The notice to quit must be given by the person holding the legal title to the premises; the holder of a contract of sale cannot give a valid notice, nor can a purchaser who has not obtained his deed. *Reeder v. Sayre*, 70 N. Y. 180.

Precedents for Preliminary Notice to Quit.

Michael Howard, owner,	}
agst.	
Henry Slater, and all persons occupying the premises hereinafter described.	

Please take notice that I am the owner of the premises known as No. 151 State street, in the city of Troy, having purchased the same at an execution sale against Samuel Spencer, and having received my deed thereon and perfected my title thereunder, and that I require all persons occupying said property to quit the same on the 1st day of May, 1887, pursuant to the provisions of the Code of Civil Procedure, and fail not, under the pains and penalties of the law.

Dated TROY, April 1, 1887.

MICHAEL HOWARD,

Owner.

To HENRY SLATER and all other persons occupying the said premises :

Michael Howard, owner,	}
agst.	
Henry Slater, and all persons occupying the premises hereinafter described.	

Please take notice that I am the owner of the premises known as No. 89 Washington avenue in the city of Troy, having purchased the same at a foreclosure sale thereof, and having received my deed thereon, and perfected my title thereunder, I require all persons occupying said property to quit the same on the 1st day of May, 1887, pursuant to the provisions of the Code of Civil Procedure, and fail not under the penalties of the law.

Dated NEW YORK, April 1, 1887.

MICHAEL HOWARD,

Owner.

To HENRY SLATER and all other persons occupying the said premises.

Form of Notice where Farm is Worked on Shares.

To HIRAM GARRISON, and all other persons occupying the said premises.

Thomas Harnden, owner, <i>agst.</i> Hiram Garrison, and all other persons occupying the premises hereinafter described.	}
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Please take notice that I am owner of the farm known as "The Broadhead farm," situate in the town of Ulster, in the county of Ulster, and State of New York, and described as follows: (here insert description) which farm you, the said Hiram Garrison, now occupy and hold, under an agreement with me to cultivate it upon shares, and the time fixed in the agreement for the occupancy of the said Hiram Garrison having expired, I do hereby require all persons occupying the said property to quit the same on the 5th day of May, 1887, pursuant to the provisions of the Code of Civil Procedure, and fail not under the pains and penalties of the law.

Dated April 2, 1887.

THOMAS HARNDEN,
Owner.

Form of Notice to Squatter.

To HENY RIGHTMYER:

Please take notice that I am the owner of the piece or parcel of land known as No. 312 Washington avenue, in the city of Kingston, described as follows: (insert description) upon which you have intruded, or squatted upon, and that I require you to quit the said premises on or before the 1st day of November, 1886, pursuant to the provisions of section 2232 of the Code of Civil Procedure, and that any permission heretofore given to occupy the same is hereby revoked.

Dated September 28, 1886.

CHARLES G. CHALMERS,
Owner.

§ 2237. An owner or tenant of real property, in the immediate neighborhood of other demised real property, which is used or occupied as a bawdy-house, or house of assignation for lewd persons, may serve personally upon the owner or landlord of the premises, so used or occupied, or upon his agent, a written notice, requiring the owner or landlord to make an application for the removal of the person so using or occupying the same. If the owner or landlord, or his agent, does not make such an application, within five days thereafter; or, having made it, does not in good faith diligently prosecute it, the person giving the notice may make such an application, stating in his petition the facts so entitling him to make it. Such an application has the same effect, except as otherwise expressly prescribed in this title, as if the applicant was the landlord or lessor of the premises.

Precedent for Petition.—Bawdy-House.

To Hon. WILLIAM S. KENYON, County Judge of Ulster County:

The subscriber applies for process and proceedings to remove John Doyle, the tenant and occupant of the premises hereinafter described, on the grounds set forth in the following petition.

KINGSTON, May 23, 1886.

DANIEL GREENE.

STATE OF NEW YORK, }
County of Ulster, } ss.:

The petition of Daniel Greene respectfully alleges and shows that he is the landlord of the premises hereinafter mentioned; that on or about the 1st day of September, 1885, deponent entered into an agreement with John Doyle as tenant, by the terms of which agreement the said tenant hired from your petitioner, as landlord, the dwelling-house situated and known as No. 47 Harris street, in the city of Kingston, for the term of one year from September 1, 1885, at an agreed rental; that the said tenant entered into the occupation of said premises and is now in possession and occupation of the same. The said premises are now being used and occupied by the said tenant (and by other persons connected with him therein, whose names your petitioner cannot ascertain), as a bawdy-house and house of assignation for lewd persons, for purposes of prostitution and as a place of resort for such persons for similar purposes, contrary to the statute of the State of New York, in such case made and provided, and that the said tenant continues in possession of the same, and uses and occupies said premises as such bawdy-house and house of assignation, in violation of the law and without the permission of the landlord. Therefore, your petitioner prays for a final order to remove the said John Doyle from said premises. And your petitioner will ever pray.

Dated KINGSTON, May 25, 1886.

DANIEL GREENE.

STATE OF NEW YORK, }
County of Ulster, } ss.:

Daniel Greene, being duly sworn, says that he is the petitioner above mentioned, and that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me, }
 May 25, 1886. }

DANIEL GREENE.

JOHN RIDER,

Notary Public, Ulster County.

Form of Notice by Neighbor Requiring Landlord to Prosecute.

To HENRY FRENCH:

Please take notice that I am the owner of the premises No. 56 Liberty street, in the city of Utica, in the immediate neighborhood of your house, No. 60 Liberty street, said city, and that your said house is occupied and used as a bawdy-house, and that I require you to make application for the removal of the person so using and occupying the same. In case you do not make such application within five days after the service upon you of this notice; or, having made it, do not in good faith diligently prosecute it, I will, by virtue of section 2237 of the Code of Civil Procedure, make and prosecute such application, to the end that said nuisance may be abated.

SAMUEL HAYES.

§ 2238. The judge or justice, to whom a petition is presented, as prescribed in either of the foregoing sections of this title, must thereupon issue a precept, directed to the person or persons designated in the petition as being in possession

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of the property, and requiring him or them forthwith to remove from the property, describing it, or to show cause, before him, at a time and place specified in the precept, why possession of the property should not be delivered to the petitioner, or, in the case specified in the last section, to the owner or landlord. The precept must be returnable, not less than three nor more than five days after it is issued; except that, where the proceeding is taken, upon the ground that a tenant continues in possession of demised premises, after the expiration of his term, without the permission of his landlord, and the application is made on the day of the expiration of the lease, or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued, at any time after twelve o'clock, noon, and before six o'clock in the afternoon.

The summons need not show that the premises are situated within the judicial district in the city of New York in which the proceedings are instituted, it is sufficient if it properly describe the premises. *People v. Kelly*, 20 Hun, 549. The summons must be directed to the tenant or occupant by name, and where the direction was left in blank, the proceedings were held to be defective, though service was made upon the proper party, and an appearance by the tenant, for the purpose of objecting, is not a waiver of the defect. The premises too must be properly described. *Cunningham v. Golet*, 4 Den. 71; *Hill v. Stocking*, 6 Hill, 314; *Deuel v. Rust*, 24 Barb. 438. Where the proceedings were instituted against two, both of whom were named in the affidavit, and the summons was directed to one of them, and "any other person in possession of the premises," and both appeared before the officer, made affidavit and had a trial by jury without objecting to the summons, it was held it was sufficient. *Sims v. Humphrey*, 4 Den. 185. In a case of holding over the term without permission, it was held that it is discretionary with the magistrate, when the summons is not issued on the same day the term expires, to make the summons returnable on any day within the five days. *Bushnell v. Ostrander*, 30 How. 93. But it is held on the contrary, that a summons issued on the last day of the term may be made returnable on the same day, but not on the day following. *Luhrs v. Commors*, 30 Hun, 468. And the same rule is held in *People v. Lane*, 2 T. & C. 522. The summons in a proceeding by a claimant under a tax deed in Brooklyn should be returnable in not less than three days, nor more than five days; one returnable on the same day is unauthorized and confers no jurisdiction. *People v. Andrews*, 52 N. Y. 445. The summons should require the defendant forthwith to remove from the premises, or show cause why possession of the premises should not be delivered to the landlord.

Deuel v. Rust, 24 Barb. 438. A summons, returnable on the day on which it was issued, gives no jurisdiction, except in case of holding over by a tenant after expiration of his term. *People v. Andrews*, 52 N. Y. 445. A summons issued on the 21st day of November, and returnable on the 25th, is returnable in not less than three nor more than five days, and is properly served on the 23d, at least two days before the return day. *People v. Marvin Safe Co.*, 5 Hun, 218. A clerical error in preparing the copy of the summons, so that it is made returnable at an earlier day than that specified in the original, will not render the proceedings nugatory where the tenant appears in accordance with the copy served, and makes no objection to the error, in such case the assent of the parties that the summons was returnable on the day specified will of itself confer jurisdiction, although the day specified in the original falls on Sunday. *Nemetty v. Naylor*, 100 N. Y. 562. The precept to dispossess a tenant holding over after the expiration of his term must be returnable not less than three days after its issue. It cannot be returnable the day after issue, and gives no jurisdiction. *Luhrs v. Commoss*, 13 Abb. N. C. 88. An error in the summons and judgment by which the premises appear larger than those described in the affidavit, and larger than those actually occupied, is clerical merely, and does no harm. *Warner v. Henderson*, 13 Week. Dig. 143. Where the summons was made returnable on December 10, which was Sunday, but in the copy served, the return day was stated to be December 9, and on that day parties appeared and consented to proceed without any objection being taken on account of the mistake, *held*, that it was thereby waived, and the assent to proceed conferred jurisdiction, and the question could not be reviewed in a collateral proceeding. *Nemetty v. Naylor*, 100 N. Y. 562.

Precedent for Form of Precept.

Before Hon. William S. Kenyon, *County Judge*.

James Mayor <i>agst.</i> George Jefferson.	}
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The People of the State of New York to George Jefferson, tenant above named:

You are hereby required forthwith to remove from the premises designated and described as follows, to-wit: The dwelling situated and

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known as No. 29 Broad street, in the city of Kingston, or to show cause before Hon. William S. Kenyon, county judge, at the court-room of said county judge, in the city of Kingston, on the 9th day of September, 1886, at ten o'clock in the forenoon of that day, why the possession of the said premises should not be delivered to the landlord.

Dated *the 5th day of September, 1886.*

WILLIAM S. KENYON,
Ulster County Judge.

§ 2239. In the city of New York, where the application is made to a District Court, the petition must be filed with, and the precept must be issued by, the clerk of the court; and the precept must be made returnable before the court, at the place designated, pursuant to law, for holding the court; and all subsequent proceedings in the cause must be had at that place, except as otherwise prescribed in section two thousand two hundred and forty-six of this act. If, upon the return of the precept or upon an adjourned day, the justice is unable, by reason of absence from the court-room or sickness, to hear the cause, or it is shown by affidavit that he is for any reason disqualified to sit in the cause, or is a necessary and material witness for either party, a justice of any other District Court of the city may act in his place at the same court-room.

§ 2240. The precept must be served as follows:

1. By delivering, to the person to whom it is directed, or, if it is directed to a corporation, to an officer of the corporation, upon whom a summons, issued out of the Supreme Court, in an action against the corporation, might be served, a copy of the precept, and at the same time showing him the original.

2. If the person, to whom the precept is directed, resides in the city or town in which the property is situated, but is absent from his dwelling-house, service may be made by delivering a copy thereof at his dwelling-house, to a person of suitable age and discretion, who resides there; or, if no such person can, with reasonable diligence, be found there, upon whom to make service, then by delivering a copy of the precept, at the property sought to be recovered, either to some person of suitable age and discretion residing there, or if no such person can be found there, to any person of suitable age and discretion employed there.

8. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must be served at least two days before the day on which it is returnable.

An affidavit that the copy was left with a person residing on the premises is insufficient, as not showing the absence of the defendant or that the copy was left with a proper person, as required by statute, and the service bad, if it fails to show the place where it was left is the plaintiff's residence. *Cameron v. McDonald*, 1 Hill, 512; *People v. Matthews*, 43 Barb. 168; affirmed, 38 N. Y. 451. It was held under the statute that the proof was insufficient where it was alleged the service was upon an under-tenant on the demised premises, and that the tenant was absent from his residence without stating that his residence was on the demised premises. *People v.*

Platt, 43 Barb. 116. If the summons is directed to the original lessee, but served only on an under-tenant in person, the service is insufficient; it should be served on both. *Matter of Glenn*, 1 How. 213. A slight and immaterial variance between the original summons and the copy served, where the person is not misled thereby, will be disregarded. *People v. Flannigan*, 3 Week. Dig. 579. Where service is sworn to, as being of a date prior to the date of the summons itself, the variance is fatal; it is not a mere clerical error that may be corrected. *People v. Boardman*, 4 Keyes, 59. Service on the general agent of a corporation is sufficient. *People v. City of Troy*, 6 Alb. L. J. 326. An affidavit of service of summons on two absent tenants, showing that the service was made on both tenants by leaving one copy of the summons with a person of mature age and discretion, will not give jurisdiction. *People v. De Camp*, 12 Hun, 378. A return by the constable of service on the defendant personally, by leaving the original and delivering a copy thereof, is due proof of service. *People v. Lamb*, 10 Hun, 348. Personal service of a summons, out of the jurisdiction of the court or magistrate issuing it, is invalid. *Beach v. Bainbridge*, 7 Hun, 81. In summary proceedings under Laws of 1854, chapter 863, as amended by Laws of 1873, for possession of premises claimed under a tax sale, service of notice must be proved by common-law evidence; a copy of the notice with affidavit is not sufficient. *People v. Walsh*, 87 N. Y. 481. An objection to the regularity of the service of the summons, which is taken preliminarily and overruled, and an exception taken, is not waived by a subsequent appearance on the hearing. *People v. Fowler*, 2 Week. Dig. 560. And in *People v. Johnson*, 1 T. & C. 578, following 4 Denio, 71, it is held that an appearance for the sole purpose of objecting is not a waiver of any previous defects in the proceeding. An omission to show the original summons renders the service irregular. *Duell v. Rust*, 24 Barb. 438.

§ 2241. A person, to whom a copy of a precept, directed to another, is delivered, as prescribed in this title, must, without any avoidable delay, deliver it to the person to whom it is directed, if he can be found within the same town or city; or, if he cannot be so found, to his agent therein; and if neither can be so found, after the exercise of reasonable diligence, before the time when the precept is returnable, to the judge or justice who issued the same, at the time of the return thereof, with a written statement indorsed thereupon, that he has been unable, after the exercise of reasonable diligence, to find the person to whom the precept is directed, or his agent, within the town or city. A person, who willfully violates any provision of this section, is guilty of a misdemeanor; and, if he is a tenant upon the property, forfeits to his landlord the value of

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three years' rent of the premises occupied by him. A copy of this section must be indorsed upon each copy of a precept, served otherwise than personally upon the person to whom it is directed.

§ 2242. Where the case is within section two thousand two hundred and thirty-seven of this act, the precept must be directed to and served upon the owner or landlord, or his agent, and also upon the tenant or occupant of the property. Either or both of them may, upon the return day, appear and show cause why the tenant or occupant should not be removed from the property.

§ 2243. At the time when the precept is returnable, the petitioner must, unless the adverse party appears, make due proof of the service thereof, showing the time, and the place and manner of service; and, unless service was made personally upon the adverse party, or by affixing a copy of the precept, the name of the person to whom a copy of the precept was delivered, if his name can be ascertained with reasonable diligence. Where service is made by sheriff, constable or marshal, it may be proved by his certificate, stating the facts.

The constable who made the service may be sworn and testify to the facts relating thereto, even though he may have made a written return by affidavit, and if due service is proved by such evidence, that is sufficient to give jurisdiction. *Robinson v. McManus*, 4 Lans. 380. The certificate of the constable showing due service on the defendant personally, by showing the original and delivering a copy thereof to him, is due proof of the service thereof. *People v. Lamb*, 10 Hun, 348. If the return is defective, it may be amended at any time before judgment, and the power of amendment does not depend upon the appearance of defendant in the proceeding. The return to a precept in summary proceedings cannot be shown to be false in another action, for the purpose of defeating an action and rendering parties enforcing it trespassers. *Feickert v. Freisen*, 1 City Ct. 369. An affidavit that a summons was served "by affixing, and leaving so affixed, a true copy of the summons upon a conspicuous part of the premises, there being no person residing on or employed on said premises," is not sufficient, as it does not show that defendant had no residence in the city, or if he had one, that no person of suitable age or discretion upon whom service might be made could be found there. *Beach v. Bainbridge*, 7 Hun, 81. An affidavit in proceedings against one of service upon another named "residing on the premises," the first person being absent, is insufficient. *Cameron v. McDonald*, 1 Hill, 512. An affidavit of service which does not show that the copy was left with a person of mature age at the last or usual place of residence of the defendant, is defective. *People v. Matthews*, 43 Barb. 168; affirmed, 38 N. Y. 451. An affidavit which alleges service on an under-tenant on the demised premises, and that the tenant was absent from his last and usual residence, without stating that such residence is on the

demised premises, gives no jurisdiction. *People v. Platt*, 43 Barb. 116. A failure to appear admits the landlord's right, and precludes an objection on *certiorari* to the regularity of the proceedings. As to waiver by appearance, and other decisions as to service, see section 2240.

Precedent for Proof of Personal Service.

ULSTER COUNTY, ss.:

John Glennon, of the city of Kingston, said county, being duly sworn, says that he did on the 24th day of December, 1886, at ten o'clock in the forenoon, at No. 76 Crown street, in the said city, serve the within precept on Norman Garrison, the tenant therein named, by delivering to him personally a true copy thereof, and at the same time showing him the original, and that deponent is twenty-one years of age and upwards.

(*Jurat.*)

(*Signature.*)

Precedent for Proof of Service on Person of Mature Age.

ULSTER COUNTY, ss.:

John Glennon, of the city of Kingston, said county, being duly sworn, says that he did on the 13th day of August, 1886, at 11 o'clock and 45 minutes in the forenoon, serve the within precept on Henry Briggs, the tenant therein named, by leaving a true copy thereof at his dwelling-house, No. 137 James street, in the said city, with George Simpson, who is a person of suitable age and discretion, who, at the time of the said service was on, and who resides on the said premises, at the same time showing him the original; and that the said Henry Briggs, tenant, was, at the time of such service, absent from his said dwelling-house and residence, and that a copy of section 2241 of the Code of Civil Procedure was indorsed on the copy precept so served.

(*Jurat.*)

(*Signature.*)

Precedent for Proof of Conspicuous Place of Service.

ULSTER COUNTY, ss.:

Charles Link, of the city of Kingston, said county, being duly sworn, says that he did on the 4th day of April, 1887, at four o'clock in the afternoon, serve the within precept on Mary Bannon, tenant therein named, by affixing the same on a conspicuous part of the premises within described, to-wit (here describe property and place of affixing notice), and that the said Mary Bannon was absent from said premises at the time of said services, and that said premises are her dwelling-house and place of residence, and that there was no person residing or employed on said premises at the time of said services, and that a copy of section 2241 of the Code of Civil Procedure was indorsed on said copy precept.

(*Jurat.*)

(*Signature.*)

§ 2244. [*Amended*, 1882.] At the time when the precept is returnable, without waiting as prescribed in an action before a justice of the peace, or in a District Court of the city of New York, the person to whom it is directed, or his landlord, or any person in possession or claiming possession of the premises, or a part

thereof, may file, with the judge or justice who issued the precept, or with the clerk of the court; a written answer, verified in like manner as a verified answer in an action in the Supreme Court, denying generally, the allegations, or specifically any material allegation of the petition.

The denial in the defendant's affidavit should be express and positive, and not circumstantial and argumentative. *Niblo v. Post's Administrators*, 25 Wend. 284. But it is sufficient if in general terms it denies each and every allegation contained in the affidavit of the landlord. *People v. Coles*, 42 Barb. 96. Where two tenants hold under a joint demise to both, the affidavit of one of them, that the rent has not been demanded of him, does not raise an issue demanding a jury. *Geisler v. Acosta*, 9 N. Y. 227. The allegations in the landlord's affidavit, not denied, will be deemed true. *People v. Teed*, 48 Barb. 424; *McGuire v. Ulrich*, 2 Abb. 28. An affidavit which attempts to show a former adjudication must show what issue was joined, and on what ground judgment was given. *Geisler v. Acosta*, 9 N. Y. 227. The tenant must put in a verified answer; as the Code now stands a counter affidavit cannot be accepted as a valid plea. *Fuelin v. Meade*, 1 McCarty's Civ. Pro. 446. Judgment by default may be entered at the return of the summons; the justice is not obliged to wait an hour as in civil actions. *Mordant v. Miles*, 1 Abb. N. C. 300. The tenant is estopped from disputing his landlord's title when the conventional relation exists. *People v. Kelsey*, 38 Barb. 269; *Spraker v. Cook*, 16 N. Y. 567. But he may show that such title has terminated, either by its own limitation, or by conveyance, or by operation of law. *Jackson v. Davis*, 5 Cow. 123; *Buck v. Binninger*, 3 Barb. 391; *Capez v. Parker*, 3 Sandf. 662; *Despard v. Walbridge*, 15 N. Y. 374. On sale under execution, if judgment and execution are regular on their face, it is sufficient. *Brown v. Betts*, 13 Wend. 29. Nor under the same case, can a tenant show a breach of landlord's agreement to construct premises in a proper manner. Where a landlord is bound by covenants for quiet enjoyment, which would be violated by dispossessing the tenant, this constitutes a defense. *Buck v. Binninger*, 3 Barb. 391. The under-tenant has a right to deny the non-payment of rent by the tenant, and to controvert the allegations of the landlord, and to a trial of the issues so raised. *People v. Callahan*, 8 Week. Dig. 297. The rule that a tenant cannot dispute the title of his landlord does not apply to a case where a person in possession denies the facts on which the precept is issued. He may show that the alleged lease was executed under and in pursuance of a usurious agreement and is void, so that the relation of landlord

and tenant does not exist. *People v. Howlett*, 76 N. Y. 574. Fraud in obtaining an alleged lease is not an issue to be tried in summary proceedings. *Becker v. Church*, 5 State Rep. 97; S. C., 42 Hun, 258. The discontinuance, on the landlord's motion, of summary proceedings on the trial of an issue as to tenancy is not an adjudication which bars a subsequent action for rent. *Gillilan v. Spratt*, 41 How. 27. As to how far sickness in the family of the tenant will be a defense to proceedings, see *Tuomy v. Dunn*, 42 N. Y. Super. 291. It is not competent for the tenant in these proceedings to show a breach of the landlord's agreement to construct the premises in a proper manner. *People v. Kelsey*, 14 Abb. 372. A counter-claim cannot be pleaded in these proceedings. *People v. Walton*, 2 T. & C. 533.

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§ 2245. Where the application is founded upon an allegation of forcible entry or forcible holding out, the petitioner must allege and prove that he was peaceably in actual possession of the property, at the time of a forcible entry, or in constructive possession, at the time of a forcible holding out; and the adverse party must either deny the forcible entry, or the forcible holding out, or allege in his defense, that he, or his ancestor, or those whose interest he claims, had been in quiet possession of the property, for three years together next before the alleged forcible entry or detainer; and that his interest is not ended or determined, at the time of the trial.

Actual occupancy at time of entry is not necessary in order to entitle the person injured to proceed under the statute. Naked prior possession is enough *prima facie* as against a stranger who shows no right to possession. *People v. Field*, 52 Barb. 198. But proof that at the time of the alleged forcible entry and detainer, and for a long time previous, the defendants had been in peaceable possession of the premises in question, and that the defendants had never been in possession, was held to be relevant to the questions before the jury as going to show that the defendants had not made a forcible entry within the intent of the statute. *People v. Wilson*, 13 How. 446. Valid right of possession by occupant need not be shown, it is enough that he be in peaceable and quiet occupancy at least, unless a mere trespasser, as against complainant. Where the defendant removed buildings from the premises and intruded on the possession with a number of men, it was enough to send the case to the jury. *People v. Field*, 52 Barb. 198.

Since, in proceedings to remove a person under the statute, the petition must allege either an actual or constructive possession, a petition alleging a peaceable entry by the petitioner, and a forcible ejection from the premises by the defendant, is insufficient. *Kent*

v. Sturges, Abbott's Annual, 1884, p. 303. The examination of witnesses must, however, be confined to the appropriate statutory subjects of inquiry, and defendant cannot show or avail himself of any possession in a stranger. *Carter v. Newbold*, 7 How. 166. Nor, on the other hand, can the party instituting proceedings set up a claim of title in the State, or any one else in hostility to that under which he holds. *People v. Field*, *supra*. The questions to be tried are possession and the forcible character of obtaining or holding it, not the right of possession. *People v. Porter*, 7 How. 441.

Precedent for Form of Petition for Forcible Entry and Detainer.

To Hon. WILLIAM S. KENYON, County Judge of Ulster County:

The petition of Joseph G. Krom, of the city of Kingston, Ulster county, respectfully shows that he is the owner in fee of the premises hereinafter mentioned, and that before and on the 28th day of November last, and thence hitherto, he as such owner was in the lawful, actual and peaceable occupation and possession of said premises, to-wit: (here insert description of property.)

That while your petitioner was so in such lawful, actual, peaceable occupation, and on or about the day and year last aforesaid, certain persons, among others James Dunnigan and Frank Banks, did unlawfully, and against the will of your petitioner, make an unlawful and forcible entry into and upon said premises with a strong hand, and multitude of men, and did then and there unlawfully and forcibly eject and expel your petitioner and his family, employees and agents, from said premises, and, in like manner, on said 28th day of November last, and on divers days and times since the said 28th day of November, did hold the possession of said premises by force, and that the said James Dunnigan and Frank Banks have ever since held, and still unlawfully and forcibly hold in like manner, your petitioner and his family out of possession of said premises, contrary to the form of the statute in such case made and provided. Your petitioner, therefore, prays for a final order to remove the said James Dunnigan and Frank Banks from the possession of said premises.

Dated KINGSTON, December 13, 1886.

JOSEPH G. KROM.

(Add verification.)

Precedent for Precept.

To JAMES DUNNIGAN, FRANK BANKS, and every person in possession of the premises hereinafter described, or claiming the possession thereof:

WHEREAS, Joseph G. Krom has presented to me his petition in writing, subscribed by him and duly verified by his oath, which said petition sets forth that he, the said Joseph G. Krom, is the owner of the premises hereinafter mentioned, and that on the 28th day of November last, he, as such owner, was in the lawful and actual possession and occupation of said premises, and while he was in such lawful and actual occupation, and on or about the day and year last aforesaid, you, the said James Dunnigan and Frank Banks, did make a forcible

entry into and upon said premises, and did forcibly eject the said petitioner therefrom, and that you in like manner still hold the said petitioner out of the possession of the said premises, as by reference to said petition will appear: This, therefore, is to require you, and each of you, forthwith to remove from said premises, to-wit: (here describe property) or show cause before me, county judge of Ulster county, at the chambers of the county judge, in the city of Kingston, on the 18th day of December, 1886, at one o'clock in the afternoon, why possession of said premises should not be returned to the said Joseph G. Krom, the petitioner.

Witness, Hon. William S. Kenyon, county judge of Ulster county, at said city of Kingston, December 14, 1886.

WILLIAM S. KENYON,

County Judge of Ulster County.

Precedent for Warrant.

To the Sheriff of the County of Ulster :

WHEREAS, Joseph G. Krom, by petition duly made and verified by him and presented to me, county judge of Ulster county, did allege and prove that he was peaceably in actual possession of (here describe property), and that James Dunnigan and Frank Banks, on the 28th day of November, 1886, with strong hand and a multitude of people, did make forcible entry into and upon said premises, and did wrongfully exclude the said Joseph G. Krom therefrom, and has ever since wrongfully held the said Joseph G. Krom out of possession of said property:

Whereupon, I issued a precept requiring the said James Dunnigan and Frank Banks forthwith to remove from the said premises, or show cause before me at a certain time, now passed, why the possession of the said premises should not be delivered to the said petitioner; and no good cause having been shown, or any way appearing to the contrary, and due proof of the service of such precept having been made to me: Therefore, in the name of the people of the State of New York, you are commanded to remove the said James Dunnigan and Frank Banks, and all persons, from the said premises, and put the petitioner in full possession thereof.

In witness whereof, I have subscribed to these presents this 28th day of December, 1887.

WILLIAM S. KENYON,

County Judge of Ulster County.

§ 2246. In a District Court of the city of New York, at the time of joining issue, the justice sitting in the cause may, in his discretion, upon motion of either party, or, if no justice is present, the clerk may, by consent of both parties, make an order transferring the cause for trial, to a District Court of an adjoining district, which thereupon has the same jurisdiction and power, at its own court-house, as if the property was situated within its district.

§ 2247. [Amended, 1881 and 1882.] The issues joined by the petition and answer must be tried by the judge or justice, unless either party to such proceedings shall, at the time designated in such precept for showing cause, demand a jury, and at the time of such demand, pay to such judge or justice the necessary costs and expenses of obtaining such jury. If a jury be demanded, and such costs

and expenses be paid, the judge or justice with whom such petition shall be filed shall nominate twelve reputable persons, qualified to serve as jurors in courts of record, and shall issue his precept, directed to the sheriff or one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the person so nominated, to appear before such judge or justice, at such time or place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference. Six of the persons so summoned shall be drawn in like manner as jurors in justices' courts, and shall be sworn by such judge or justice, well and truly to hear, try and determine the matters in difference between the parties. After hearing the allegations and proofs of the parties, the said jury shall be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the judge or justice for that purpose, who shall be sworn to keep such jury as is usual in like cases of courts of record. If such jury cannot agree after being kept together for such time as such judge or justice shall deem reasonable, he may discharge them and nominate a new jury and issue a new precept in manner aforesaid.

In a proceeding to remove a person from a portion of a pier described in the complaint by metes and bounds, if the agreement proved at the trial does not amount to a lease of the premises described, the variance is fatal. *People v. Cushman*, 1 Hun, 73. Where the facts put in issue are the ownership of the premises, and the hiring thereof to the tenant; proof of a conveyance to the landlord and payment to him of rent by the tenant, establishes both these issues against the tenant. *People v. Teed*, 48 Barb. 424. Where plaintiff has given evidence tending to show defendant went into possession with his permission and under an agreement to vacate when requested, defendant denying such agreement and claiming that she entered in right of her children, and that plaintiff had given her the premises in consideration of services, the defendant should be allowed to introduce evidence to sustain such defense. *People v. Lockwood*, 3 Hun, 304. The lessee may show that the instruments which purport to create the relation of landlord and tenant between the parties constitute in fact a mortgage to secure the repayment of a loan, and that such mortgage was void for usury. It will be presumed the offer will be proved by competent evidence. *People v. Howlett*, 13 Hun, 138; 76 N. Y. 574. Proof, to the effect that the instrument relied on to show the tenancy as a basis for a summary proceeding, is void for fraud in its procurement, is not admissible or competent matter of defense. *Becker v. Church*, 42 Hun, 258; citing *People v. Howlett*, 76 N. Y. 574. The taking of a chattel mortgage to secure the payment of overdue rent at a future day, and also to secure subsequently-accruing rent, is not a bar to summary proceedings in case of non-payment of such subsequent installments

of rent. Proof of service of notice to quit, when denied by answer, should not be made by affidavit, but by competent proof. *People v. Walsh*, 13 Weekly Dig. 440.

§ 2248. At the time when issue is joined, the judge or justice may, in his discretion, at the request of either party, and upon proof to his satisfaction, by affidavit or orally, that an adjournment is necessary, to enable the applicant to procure his necessary witnesses, or by consent of all the parties who appear, adjourn the trial of the issue, but not more than ten days, except by consent of all parties.

An adjournment, except at the request of a party to procure his witnesses, it is said, operates as a discontinuance; so held under language of Revised Statutes, in *Boller v. Mayor*, 40 N. Y. Super. 523. But contra, *Brown v. Mayor*, 66 N. Y. 385. The justice loses jurisdiction by an indefinite adjournment, and the execution of his warrant may be stayed by injunction. *Kiernan v. Reming*, 2 How. (N. S.) 89. It seems there is no provision of the statute authorizing an adjournment after the trial, and an indefinite adjournment or postponement for deliberation and decision ousts the justice of jurisdiction. *Gillilan v. Spratt*, 41 How. 27. But see *People v. Kelly*, 20 Hun, 549, which holds that the justice does not lose jurisdiction where adjournment is by consent, and that the mere taking of time after the trial to consider the questions raised is not in the nature of an adjournment. The justice is entitled to four days in which to render his decision. *People v. Loomis*, 27 Hun, 328.

Where the under-tenant only appeared on the return day, and the matter was then adjourned by consent, and on the adjourned day judgment was rendered for the landlord, it was held that there was no error. *People v. Mayor*, 66 N. Y. 385.

§ 2249. If sufficient cause is not shown upon the return of the precept, or if the verdict of the jury, or the decision of the judge or justice, upon a trial without a jury, is in favor of the petitioner, the judge or justice must make a final order, awarding to the petitioner the delivery of the possession of the property; except that, where the case is within section two thousand two hundred and thirty-seven of this act, the final order must direct the removal of the occupant. In either case, the final order must award to the petitioner the costs of the special proceeding. If the verdict or decision is in favor of the person answering, the judge or justice must make a final order accordingly, and awarding to him the costs of the special proceeding.

A judgment in summary proceedings was set aside where the landlord, to obtain it, promised to credit the rent of sub-tenants on the lease. *Elverson v. Vanderpoel*, 69 N. Y. 610. The order is to be made as required by statute. *Starkweather v. Seeley*, 45 Barb. 164.

*Precedent for Final Order.*Before William S. Kenyon, *County Judge.*

James Dubois	}
<i>agst.</i>	
Samuel Kline.	

Precept to show cause returnable the 24th day of June, 1886, at two o'clock, afternoon.

The petitioner appears on the 24th day of June and demands the possession of the premises within mentioned for (recite the cause).

The tenant appears (recite the facts).

Final order is, therefore, made the 28th day of June, 1886, in favor of the said petitioner, and I hereby award to the petitioner the delivery of the possession of the premises within described by reason of (recite the cause), and I hereby order that a warrant issue to remove the said tenant and all persons from said premises, and to put the petitioner into full possession thereof, and I award to the petitioner costs of the said proceedings.

WILLIAM S. KENYON,
County Judge of Ulster County.

§ 2250. [*Amended, 1882.*] Costs, when allowed, and the fees of officers, except where a fee is specially given in chapter twenty-one of this act, must be at the rate allowed by law in an action in a justice's court, and are limited in like manner, unless the application is founded upon an allegation of forcible entry or forcible holding out; in which case, the judge or justice may award to the successful party a fixed sum as costs, not exceeding fifty dollars in addition to his disbursements. If the final order is made by a county judge, or a special county judge, or by a mayor or recorder, an execution to collect the costs may be issued thereupon as if it was a judgment of a justice of the peace of the same city or county; and for that purpose the officer takes the place of a justice of the peace. In every other case, an execution may be issued to collect the costs awarded thereby, as if the final order was a judgment rendered in the court, of which the judge or justice is the presiding officer.

It was held in *New York Mutual Life Insurance Company v. Waldron*, in Common Pleas, reported in *New York Daily Reg.*, January 6, 1881, and 11 Week. Dig. 245, and 9 Daly, 472, that no costs can be allowed beyond the marshal's fees, where proceeding is in District Court. The section has since been amended. As to costs in New York city, see Laws of 1882, chap. 410 (Consolidation Act), § 1418.

§ 2251. [*Amended, 1882.*] Where the final order is in favor of the petitioner, the judge or justice must thereupon issue a warrant, under his hand, directed to the sheriff of the county, or to any constable or marshal of the city in which the property or a portion thereof is situated, or if it is not situated in a city, to any constable of any town in the county, describing the property and commanding the officer to remove all persons therefrom; and also, except where the case is

within section two thousand two hundred and thirty-seven of this act, to put the petitioner into the full possession thereof.

In case the magistrate refuse to issue the warrant on demand after decision, *mandamus* lies. *People v. Willis*, 5 Abb. 205.

Precedent for Warrant.

To the Sheriff of Ulster County:

WHEREAS, Cornelius Van Cott, by petition made and verified by him and presented to me, county judge of Ulster county, did allege and prove that (here recite facts stated in petition). Whereupon, I issued a precept, requiring the said Lamont Jones forthwith to remove from the said premises, or show cause before me at a certain time, now passed, why the possession of the said premises should not be delivered to the said petitioner. And no good cause having been shown, or any way appearing to the contrary, and due proof of the service of such precept having been made to me: Therefore, in the name of the people of the State of New York, you are commanded to remove the said Lamont Jones, and all persons, from the said premises, and put the petitioner in full possession thereof.

In witness whereof, I have subscribed to these presents, the 28th day of June, 1886.

WILLIAM S. KENYON,
County Judge of Ulster County.

§ 2252. The officer, to whom the warrant is directed and delivered, must execute it, according to the command thereof, between the hours of sunrise and sunset.

In the absence of special direction by the landlord, he cannot be held liable for any abuse of process by the officer. *Welch v. Cochran*, 63 N. Y. 181. But where the landlord directs the removal of the property of the tenant, or that of others, in the landlord's possession, he should be held liable for the negligence or carelessness, if any, of the constable removing them, but the question of due care and prudence is peculiarly one of fact for the referee. *Jansen v. Bernard*, 12 Week. Dig. 499.

§ 2253. The issuing of a warrant, for the removal of a tenant from demised premises, cancels the agreement for the use of the premises, if any, under which the person removed held them; and annuls accordingly the relation of landlord and tenant, except that it does not prevent a landlord from recovering, by action, any sum of money, which was, at the time when the precept was issued, payable by the terms of the agreement, as rent for the premises; or the reasonable value of the use and occupation thereof, to the time when the warrant was issued, for any period of time, with respect to which the agreement does not make any special provision for payment of rent.

An eviction does not discharge from payment of rent already accrued, it only annuls the lease as to future rights and liabilities. *Johnson v. Oppenheim*, 55 N. Y. 280. The effect of the judg-

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ment in summary proceedings, and its execution, is that the lessee is divested of all right to, and control over, the property, and the owners are in possession as of their former estate, as owners of the reversion. *Pursell v. New York Life Insurance Company*, 42 N. Y. Super. 383. Though the tenant has been removed from the demised premises for non-payment of rent, yet the landlord can recover the rent due by action up to the time of issuing the warrant to dispossess. *Hinsdale v. White*, 6 Ill. 507; *McKeon v. Whiting*, 3 Denio, 452; *Giles v. Comstock*, 4 N. Y. 270; *Academy of Music v. Hackett*, 2 Hilt. 217; *Whitney v. Meyers*, 1 Duer, 266; *Stuyvesant v. Ginnler*, 12 Abb. (N. S.) 6; *Johnson v. Oppenheim*, 55 N. Y. 280. Where the eviction was during a quarter for which rent was payable in advance, it was held the most the tenant could equitably claim was a deduction for the unexpired part of the quarter. *Healy v. McManus*, 23 How. 238; *Giles v. Comstock*, 4 N. Y. 270. It is said in some of the cases above cited, and in *Featherstonhaugh v. Bradshaw*, 1 Wend. 134; *Davidson v. Donadi*, 2 E. D. S. 121; *Hackett v. Richards*, 3 id. 13; *Crane v. Hardman*, 4 id. 339, that the remedy after default is not on the lease, but against the tenant as a wrong-doer. The section, as it now stands, provides for these contingencies:

§ 2254. [*Amended*, 1885.] The party, against whom a final order is made, requiring the delivery of possession to the petitioner, may, at any time before a warrant is issued, stay the issuing thereof; and also, stay an execution to collect the costs, as follows:

1. Where the final order establishes that a lessee or tenant holds over, after a default in the payment of rent, or of taxes or assessments, he may effect a stay, by payment of the rent due, or of such taxes or assessments, and interest and penalty, if any thereon due, and the costs of the special proceeding; or by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such sum and with such sureties as the judge or justice approves, to the effect that he will pay the rent, or such taxes or assessments, and interest and penalty and costs, within ten days, at the expiration of which time a warrant may issue, unless he produces to the judge or justice satisfactory evidence of the payment.

2. Where the final order establishes that a lessee or tenant has taken the benefit of an insolvent act, or has been adjudicated a bankrupt, he may effect a stay, by paying the costs of the special proceeding, and by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect that he will pay the rent of the premises, as it has become, or thereafter becomes due.

3. Where the final order establishes that the person against whom it is made, continues in possession of real property, which has been sold by virtue of an execution against his property, he may effect a stay, by paying the costs of the special proceeding, and delivering to the judge or justice, or the clerk of the court,

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an affidavit, that he claims the possession of the property, by virtue of a right or title, acquired after the sale, or as guardian or trustee for another; together with his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay any costs and damages, which may be recovered against him, in an action of ejectment to recover the property, brought against him by the petitioner within six months thereafter; and that he will not commit any waste upon or injury to the property, during his occupation thereof.

In an action on an undertaking, given in consideration of plaintiff discontinuing proceedings to dispossess defendant, and to deliver up said premises at a specified time, which defendant failed to do, the reasonable costs and expenses incurred by plaintiff in obtaining said possession are a portion of the damage which he is entitled to recover. *Schermerhorn v. Carter*, 8 Week. Dig. 383. This section was held applicable to chapter 384, Laws of 1854, relating to tax sales in the city of Brooklyn, and proceedings thereunder were stayed by undertaking in *People v. Palmer*, 16 Hun, 136.

Precedent for Undertaking where Property has been Sold.

(Title.)

WHEREAS, In certain proceedings, commenced on the 14th day of July, 1886, before William S. Kenyon, Esq., county judge of Ulster county, by Lamont Johnson against Daniel Hinkley, to recover the possession of certain real estate, to-wit: (here insert description of property) sold on execution against said Daniel Hinkley, the said judge has, by final order made the 12th day of August, 1886, established that the said Daniel Hinkley continues in possession of said real property, after such execution sale, and the said Daniel Hinkley, having paid the costs of said special proceedings, and filed the affidavit required by subdivision 3 of section 2254 of the Code of Civil Procedure: Now, therefore, in order to stay the issuing of the warrant in said proceedings, and in order to satisfy the requirements of said statute, we, the said Daniel Hinkley, before named, and James Dyer, of Kingston, and Hiram Sidney, of Saugerties, said county, do hereby undertake that the said Daniel Hinkley will pay to the said Lamont Johnson any costs and damages which may be recovered against him, the said Daniel Hinkley, in an action of ejectment to recover the property to be brought against him, by the said Lamont Johnson, within six months thereafter, and that he, the said Daniel Hinkley, will not commit waste upon, or injury to the property during his occupation.

Dated KINGSTON, August 20, 1887.

(Add acknowledgment and justification, usual forms.)

§ 2255. Where an undertaking is given, in a case specified in subdivision first of the last section, the judge or justice must deliver it to the person against whom the final order was made, upon his producing the evidence of payment, mentioned in that subdivision. If he does not produce such evidence within ten days, the judge or justice must deliver it to the petitioner. In every other case specified in

the last section, the judge or justice must deliver the undertaking to the petitioner, immediately after his approval thereof.

§ 2256. Where the special proceeding is founded upon an allegation that a lessee holds over, after a default in the payment of rent, and the unexpired term of the lease, under which the premises are held, exceeds five years, at the time when the warrant is issued; the lessee, his executor, administrator, or assignee, may, at any time within one year after the execution of the warrant, pay or tender to the petitioner, his heir, executor, administrator, or assignee, or if, within five days before the expiration of the year, he cannot, with reasonable diligence, be found within the city or town, wherein the property, or a portion thereof, is situated, then to the judge or justice who issued the warrant, or his successor in office, all rent in arrear at the time of the payment or tender, with interest thereupon, and the costs and charges incurred by the petitioner. Thereupon the person, making the payment or tender, shall be entitled to the possession of the demised premises, under the lease, and may hold and enjoy the same, according to the terms of the original demise, except as otherwise prescribed in the next section but one.

A tenant dispossessed under summary proceedings cannot redeem within the year, unless on payment of all rent in arrears and all costs and charges incurred by the lessor, he is not entitled to an account of the intermediate rents and profits. *Pursell v. N. Y. Life Insurance Co.*, 10 J. & S. 383. And it is held in the same case that tender of the difference between said arrears and the profits received by the landlord during the interval is not sufficient. The landlord can only be called upon to account after a redemption under the statute has been effected, but if he has accepted payment of a less sum an accounting may be had to ascertain whether there has been a waiver. *Crawford v. Waters*, 46 How. 210. The provisions of 2 Revised Statutes, 515, section 43, were not repealed as to leases having an unexpired term of five years to run, by chapter 240, Laws of 1842. *Pursell v. N. Y. Life Insurance Co.*, 42 N. Y. Super. 383. To entitle the lessee to redemption it must appear that the unexpired term of the lease exceeds five years at the time of the issuing the warrant, and that the rent and costs have been properly tendered or security offered. *Bokee v. Hammersly*, 16 How. 461. The right of a tenant to redeem from purchaser at foreclosure is discussed in *People v. Dudley*, 58 N. Y. 323.

§ 2257. In a case specified in the last section, a judgment creditor of the lessee, whose judgment was docketed in the county, before the precept was issued, or a mortgagee of the lease, whose mortgage was duly recorded in the county, before the precept was issued, may, at any time before the expiration of one year after the execution of the warrant, unless a redemption has been made as prescribed in the last section, file with the judge or justice who issued the warrant, or with his successor in office, a notice, specifying his interest and the sum due to him, describing the premises, and stating that it is his intention to redeem, as prescribed in this section. If a redemption is not made by the lessee, his executor, administrator, or assignee, within a year after the execution of the warrant, the

person so filing a notice, or, if two or more persons have filed such notices, the one who holds the first lien, may, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding the last day of the year, redeem for his own benefit, in like manner as the lessee, his executor, administrator, or assignee might have so redeemed. Where two or more judgment creditors or mortgagees have filed such notices, the holder of the second lien may so redeem, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which the holder of the first lien might have redeemed; and the holder of the third and each subsequent lien may redeem, in like manner, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which his predecessor might have redeemed. But a second or subsequent redemption is not valid, unless the person redeeming pays or tenders to each of his predecessors who has redeemed, the sum paid by him to redeem, and also the sum due upon his judgment or mortgage; or deposits those sums with the judge or justice, for the benefit of his predecessor or predecessors.

§ 2258. Where a redemption is made, as prescribed in either of the last two sections, the rights of the person redeeming are subject to a lease, if any, executed by the petitioner, since the warrant was issued, so far that the new lessee, his assigns, under-tenants, or other representatives, may, upon complying with the terms of the lease, hold the premises so leased until twelve o'clock, noon, of the first day of May, next succeeding the redemption. And, in all other respects, the person so redeeming, his assigns and representatives, succeed to all the rights and liabilities of the petitioner under such a lease.

§ 2259. The person redeeming, as prescribed in the last three sections, or the owner of the property so redeemed, may present to the judge or justice who issued the warrant, or to his successor in office, a petition, duly verified, setting forth the facts of the redemption, and praying for an order establishing the rights and liabilities of the parties upon the redemption. Whereupon the judge or justice must make an order, requiring the other party to the redemption to show cause before him, at a time and place therein specified, why the prayer of the petition should not be granted. The order to show cause must be made returnable, not less than two nor more than ten days, after it is granted; and it must be served at least two days before it is returnable. Upon the return thereof, the judge or justice must hear the allegations and proofs of the parties, and must make such a final order as justice requires. The costs and expenses must be paid by the petitioner. The final order, or a certified copy thereof, may be recorded in like manner as a deed. A person, other than the lessee, who redeems as prescribed in the last three sections, succeeds to all the duties and liabilities of the lessee, accruing after the redemption, as if he was named as lessee in the lease.

§ 2260. An appeal may be taken from a final order, made as prescribed in this title, to the same court, within the same time, and in the same manner, as where an appeal is taken from a judgment rendered in the court, of which the judge or justice is the presiding officer, and with like effect; except as otherwise prescribed in the next two sections.

Under the statutes before the present Code, the right of appeal to the County Court existed, from justices' court, and was concurrent with *certiorari*. *Williams v. Bigelow*, 11 How. 83; *People v. Perry*, 16 Hun, 461. But the decision of the District Courts in New York city, or the Marine Court, must be reviewed by *certio-*

rari. *McIntyre v. Hernandez*, 39 How. 121; *Freeman v. Ogden*, 17 Abb. 326. And as the practice then existed no appeal lay to the General Term from the County Court. *Carpenter v. Green*, 6 T. & C. 550. As the section now stands the appeals are to be taken in the usual manner in causes tried in the courts where the proceedings are had. In *Shaw v. McCarty*, 63 How. 286, it is said, that an appeal from the present City Court must be taken to the General Term of that court, and then to the Common Pleas. A claim for possession of land does not entitle appellant to a new trial on appeal under section 3068. *Brown v. Cassady*, 34 Hun, 55.

§ 2261. The issuing or execution of the warrant cannot be stayed by such an appeal, or by the giving of an undertaking thereupon, otherwise than as prescribed in the next section. An appeal cannot be taken to the Court of Appeals, from a final determination of the General Term of the Supreme Court or of a superior city court, upon such an appeal, unless the latter court, by an order made at the General Term where the final order is made, or the next General Term thereafter, allows it to be taken.

An appeal to the County Court of itself merely transfers the case to that court for hearing, but does not stay the warrant. *Sage v. Harpending*, 34 How. 1. Only a single appeal by all the parties aggrieved is necessary. *People v. Gildersleeve*, 6 Week. Dig. 460; *Schenck v. Prame*, 63 How. 165. The right to a stay of proceedings on appeal from a final order only exists where the tenant holds over after default in the payment of rent, not where the demised premises are used for an alleged illegal purpose. *Shaw v. McCarty*, 2 Civ. Pro. 235.

§ 2262. Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or tenant holds over, after a default in the payment of rent, the issuing and execution of the warrant may, except in the city and county of New York, be stayed by the order of the county judge. Such an order can be made only upon the appellant's giving the security required to perfect the appeal, and to stay the execution of the order appealed from, and also an undertaking to the petitioner, in a sum, and with sureties, approved by the county judge, to the effect, that if, upon the appeal, a final determination is rendered against the appellant, he will pay all rent accruing or to accrue upon the premises, or, if there is no lease thereof, the value of the use and occupation of the premises, subsequent to the institution of the special proceeding.

Precedent for Undertaking to Obtain Order for Stay.

Before Hon. William S. Kenyon, County Judge.

In the Summary Proceedings, wherein Lamont Johnson is landlord, <i>agst.</i> Daniel Hinkley, tenant.	}
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WHEREAS, On the 17th day of July, 1887, in proceedings under the Code of Civil Procedure in relation to summary proceedings to recover

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the possession of real property, Lamont Johnson, the petitioner, as landlord, obtained a final order against Daniel Hinkley, awarding the said Johnson possession of the premises (here insert description), establishing a default in the payment of rent amounting to the sum of \$250, and allowing the said Lamont Johnson the sum of \$25 costs, and the above-named Daniel Hinkley feeling aggrieved thereby, has appealed from the said final order to the County Court of the county of Ulster, and the said Daniel Hinkley having given the necessary security upon the said appeal: Now, therefore, we, the said Daniel Hinkley, Julius Graham and Simon Kline, all of the city of Kingston, in the county of Ulster, do for the purpose of obtaining an order from the county judge, staying the issuing and execution of the warrant in said proceedings, pursuant to the provisions of section 2262 of the Code of Civil Procedure, hereby undertake in the sum of \$500, that if upon the said appeal a final determination is rendered against the said Daniel Hinkley, that the said Daniel Hinkley will pay to the said Lamont Johnson all rent accruing or to accrue upon the said premises (or if there is no lease), the value of the use and occupation of the premises subsequent to the institution of the special proceeding.

Dated August 17, 1887.

(Add justification and acknowledgment in usual form.)

Indorsed:—"I hereby approve of the amount of the within undertaking and the sufficiency of the sureties thereon."

(Signed.)

Precedent for Order to Stay Execution.

(Caption usual form.)

(Title.)

It having been made to appear by Lamont Johnson, that on the 12th day of July, 1887, in summary proceedings to recover the possession of real property, the said Lamont Johnson, as landlord, obtained a final order against Daniel Hinkley, awarding the said Lamont Johnson the possession of the premises known as (here describe premises), and establishing a default in the payment of rent; and it further appearing that the said Daniel Hinkley has appealed from the said final order to the County Court of this county, and has given the usual security upon such appeal, and has also given an undertaking to obtain a stay, according to the requirements of section 2262 of the Code of Civil Procedure in a sum and with sureties which have been approved by me: Now, therefore, on motion of De Witt Ostrander, attorney for the said Daniel Hinkley, it is hereby ordered that the issuing and execution of the warrant upon the final order be, and the same is hereby, stayed until the final determination of the said appeal.

WILLIAM S. KENYON,
County Judge.

§ 2263. If the final order is reversed upon the appeal, the appellate court may award restitution to the party injured, with costs; and it may make an order, or issue any other mandate, necessary to carry its determination into effect. The person dispossessed may also maintain an action, to recover the damages which he has sustained by the dispossession.

Where the proceeding is reversed on the ground of the insuffi-

ciency of the landlord's affidavit, if there is nothing in the affidavit to enable the court to determine the rights of the parties, it is the duty of the court to award restitution and leave the parties to assert their rights in the legal way. *Wolcott v. Schenck*, 16 How. 449; *People v. Matthews*, 38 N. Y. 451. But on the other hand it is said in *People v. Hamilton*, 15 Abb. 328; affirmed on another point, 39 N. Y. 107, that on a reversal of a judgment in the landlord's favor, restitution will not be awarded where the judgment is on the ground of irregularities, and it appears that the landlord should again prevail in regularly conducted proceedings. Restitution will not be ordered after the tenant's right of possession has expired. *Chretien v. Doney*, 1 N. Y. 419; *People v. Gedney*, 15 Hun, 475. But again in *People v. Lockwood*, 3 Hun, 304, it is held that, although the judgment of the justice may be reversed for error, yet if the right to the possession is not clear, restitution will not be awarded or costs given. Restitution will not be ordered in favor of a person not a party to the proceeding. *People v. McCaffery*, 42 Barb. 530. The parties on reversal are restored to the position they occupied before the proceedings were instituted. *Hayden v. The Florence Machine Co.*, 54 N. Y. 221. Where restitution has been awarded, and the decision upon which it was had has been subsequently reversed, a re-restitution will be awarded as of course. *People v. Shaw*, 1 Cai. 125; *Matter of Shotwell*, 10 Johns. 304. Costs may be given whether restitution is awarded or not. *Chretien v. Doney*, 1 N. Y. 419. Plaintiff is entitled to recover such damages as were the direct consequences of defendants' acts. The plaintiff is not bound to gather up the fragments of his scattered and broken chattels; he may recover for money concealed by him on the premises. *Eten v. Luyster*, 60 N. Y. 252. An under-tenant may recover damages, being a tenant under the statute. S. C., 37 Sup. Ct. 486. Damages to plaintiff's business are not recoverable in addition to damages to property. In such an action it is immaterial upon what grounds the decision dispossessing plaintiff was reversed. *Hayden v. Florence Machine Co.*, 54 N. Y. 221. In such an action, the process, if regular, protects the officer; but where an under-tenant, who was not a party to the proceedings, was dispossessed, the landlord is responsible. *Croft v. King*, 8 Week. Dig. 179. See *Welch v. Cochran*, 63 N. Y. 181; *Jansen v. Bernard*, 12 Week. Dig. 499.

§ 2264. This title does not impair the rights of a landlord, lessor, or tenant, in a case not therein provided for. Where a special statutory provision confers a

right to take proceedings, in the manner heretofore prescribed by law, for the summary removal of a person in possession of real property, the proceedings thereunder must be taken as prescribed in this title. A final order, made in a special proceeding, taken as prescribed in this title, is not a bar to an action of ejectment, to recover the property affected thereby.

It seems that a judgment by default for non-payment of rent is conclusive in the landlord's action to recover rent as to the existence and validity of the lease, the occupation by the tenant, and that some rent is due, but it is not conclusive as to the amount of rent, though it is alleged in the affidavit on which the proceedings are founded. *Jarvis v. Driggs*, 69 N. Y. 143; *Brown v. Mayor*, 66 id. 385. In proceedings to recover rent, judgment in summary proceedings and papers used as evidence therein, are not evidence of the lease, or of the length of occupancy or its terms. *Evans v. Post*, 5 Hun, 338.

§ 2265. Where a petition is presented, as prescribed in this title, the proceedings thereupon before the final order, and if the final order awards delivery of the possession to the petitioner, the issuing or execution of the warrant thereupon, cannot be stayed or suspended by any court or judge, except in one of the following methods:

1. By an order made, or an undertaking filed, upon an appeal, in a case and in the manner specially prescribed for that purpose in this title.

2. By an injunction order, granted in an action against the petitioner. Such an injunction shall not be granted before the final order in the special proceeding, except in a case where an injunction would be granted to stay the proceedings, in an action of ejectment, brought by the petitioner, and upon the like terms; or after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment in such an action, and upon the like terms.

This section implies that an injunction may be granted before the final order in summary proceedings, at least where one could be granted to stay proceedings in an action of ejectment. *Gilman v. Prentice*, 3 State Rep. 544; citing *Chadwick v. Spargur*, 1 Civ. Pro. 422. An injunction will issue where the magistrate or court has no jurisdiction. *Capet v. Parker*, 3 Sandf. 662; *Sherman v. Wright*, 49 N. Y. 227.

In case there has been fraud, undue advantage, or surprise in the conduct of the proceedings. *Mary v. James*, 2 Daly, 437; *Griffith v. Brown*, 23 How. 4; *Cure v. Crawford*, 5 id. 293; *Forrester v. Wilson*, 1 Duer, 624; and in case the defense is of an equitable character, not cognizable before the justice or County Court. *McIntyre v. Hernandez*, 39 How. 121; *Armstrong v. Cummings*, 20 Hun, 313. It is said by Landon, J., in dissenting opinion in *Becker v. Church*, 42 Hun, 264, citing *Knox v. McDonald*, 25 id. 268, and *Broadwell v. Holcomb*, 4 Civ. Pro. 159, that summary proceed-

ings will not be restrained by injunction unless the tenant has some equity or defense of which the county judge has no jurisdiction. Same principle, *Gilman v. Prentice*, 3 State Rep. 544. This question is discussed in *Bokee v. Hammersly*, 16 How. 461. The decision in *Bean v. Pettengill*, 7 Robt. 7, is against the current of authority as to the right to an injunction in case of lack of jurisdiction. In addition to these grounds, it is held in *Landon v. Supervisors of Schenectady*, 24 Hun, 75, that the right of a tenant to remove a building may be sufficient ground for an injunction. Where a justice of a New York District Court refuses to appoint a guardian *ad litem* for an infant defendant, the latter cannot maintain an action to restrain the enforcement of the warrant; the remedy is by appeal. *Jessurun v. Mackie*, 24 Hun, 624; appeal dismissed, 86 N. Y. 622. An injunction will not be granted after the warrant of dispossession has been executed. *Roberts v. Matthews*, 18 Abb. 199. Nor where the defendant has a perfect defense to the proceeding, and does not show that he had no evidence to prove such defense. *Seebach v. McDonald*, 11 Abb. 95. Nor in any case where the defense could have been proven on the hearing. *Rapp v. Williams*, 4 T. & C. 174; *Wordsworth v. Lyton*, 5 How. 463; *Smith v. Burr*, 8 id. 168; *Marks v. Wilson*, 11 Abb. 87; *Ward v. Kelsey*, 14 id. 106; *McGune v. Palmer*, 5 Robt. 607. An injunction will not issue, because there exists a counter claim against the rent, if the landlord is solvent. *Brown v. Metropolitan Gas-light Co.*, 38 How. 133. As to whether it will issue where it is claimed lease has been extended, see *Rapp v. Williams*, 1 Hun, 716; *Crawford v. Kastner*, 26 id. 440. An injunction will not be granted to one not a party to the proceeding merely because he is likely to be disturbed in his possession, the threatened injury not being irreparable. *Aaron v. Baum*, 7 Robt. 340; *Many v. James*, 37 How. 52. Where an action is pending for a renewal of the lease, if the tenant shows himself equitably entitled to a renewal, an injunction will issue. *Graham v. James*, 7 Robt. 468; *Crawford v. Kastner*, 26 Hun, 408. An injunction can issue after the warrant is issued. *Griffith v. Brown*, 28 How. 4; *Forrester v. Wilson*, 1 Duer, 624. In *Carsels v. Fisk*, 15 Week. Dig. 255, it is said that nothing short of an extreme case, clearly established, will justify an injunction to stay summary proceedings against a tenant. In *Knox v. McDonald*, 25 Hun, 268, it is held that an injunction should not issue to restrain the execution of the warrant, unless the plaintiff is making an oppressive use of it, or that the plaintiff's title to the premises has

terminated, or that the defendant has acquired some interest or equity in the subject-matter of the action which should be protected, or that the judgment was obtained by fraud or collusion. An injunction cannot be granted until there has been a final order in the summary proceedings. *Matter of White*, 12 Abb. N. C. 348.

An injunction will not be granted to prevent the landlord from instituting proceedings on the ground that he has extended the lease. That question is to be determined in the summary proceedings. *Rapp v. Williams*, 1 Hun, 716. Before the final order in summary proceedings, an injunction can be granted against the petitioner, only in a case where it would be granted to stay proceedings in an action of ejectment. *People v. Parker*, 63 How. 3. After the entry of a final order awarding possession to the landlord by reason of the illegal use of the premises, the court has no authority to stay execution of warrant. *Shaw v. McCarty*, 2 McCarty, 235; *Van Schaick v. Coster*, id. 239. The justice loses jurisdiction by an indefinite adjournment, and the execution of his warrant thereafter should be restrained by injunction. *Kiernan v. Reming*, 2 How. (N. S.) 89; *Brown v. Cassady*, 34 Hun, 55. When the defense is an equitable one, if the District Court proceed with the case it may be enjoined. *Crawford v. Kastner*, 26 Hun, 440. There is no provision for stay on an appeal from a judgment in case of tenant holding over after expiration of his term, or in case of forcible entry or detainer, except where there are allegations of fraud or collusion in the proceedings, or that the magistrate has no jurisdiction. *Coster v. Van Schaick*, 64 How. 100.

CHAPTER XV.

PROCEEDINGS TO PUNISH A CONTEMPT OTHER THAN A CRIMINAL CONTEMPT.

§ 2266. In a case specified in section fourteen of this act, or in any other case where it is specially prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish, by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded or prejudiced thereby, the offense must be punished as prescribed in this title.

Proceedings to punish for contempt are of two kinds, each having

a distinct object in view, the one to protect the rights of private parties, the other to protect the dignity of the court and to punish persons guilty of willful disobedience of the mandates. In the former case the purpose being to preserve private rights, it is immaterial whether the contempt was designedly or negligently committed, the power and duty of the court to redress the wrongs of the injured party are the same. If, for instance, a person transfer property or do any other act in disobedience of an injunction or other order, it can make no difference to the injured suitor whether it was done innocently or with evil intent. His loss is the same in either event, and proceedings to punish the offender with a view to adjusting the rights of the parties would look to indemnity only. Of course, if the disobedience was willful, the court could, at the same time that it enforced indemnity, inflict punishment for a criminal contempt; on the other hand, if the only purpose of the proceedings is to punish the prisoner and maintain the dignity of the court, the disobedience must be designed and willful, and hence the law terms this a criminal contempt. If, for example, one after examination wrongfully interpret and through this mistake disobey an order, the majesty of the law is not offended and the dignity of the court is not impaired, and as he is innocent of willful offense, the infliction of punishment could have no justification. The willful disobedience referred to in the statute relating to criminal contempts means conduct intentionally and designedly at variance with the mandate of the court. The disobedience need not be malicious, but it must be in pursuance of an intent to disregard the mandate of the violated order. *People v. Aitken*, 19 Hun, 327. The contempt must be such as to defeat, impede or impair a right or remedy to be punishable, *Sandford v. Sandford*, 2 State Rep. 133; but the rule is otherwise as to a criminal contempt, and a guilty party may be punished without proof that the adverse party has been injured, *Stubbs v. Ripley*, 39 Hun, 626; appeal dismissed, 102 N. Y. 734. The distinction between civil and criminal contempts is given. *Matter of Watson*, 3 Lans. 408; *People v. Cowles*, 4 Keyes, 46; *Hawley v. Bennett*, 4 Paige, 163; *People v. Spaulding*, 10 id. 234; *People v. Hackley*, 24 N. Y. 74; *People v. Restell*, 3 Hill, 289; *People, ex rel. Munsell, v. Oyer and Terminer of New York*, 101 N. Y. 245. The class of contempts intended to be punished under the provisions of this article does not include criminal contempts, and the codifiers say that they have "deemed it inexpedient to embody the practice relating to criminal contempts in this statute, not

only because such a course would be inconsistent with the rules laid down by us for our guidance in this revision, but also because we deem it inexpedient to restrict the courts by statutory provisions to a prescribed mode of procedure, in a matter so important and admitting of such a variety of circumstances with respect to the nature of the offense and the most appropriate method of punishment, as the proceedings necessary for the preservation of their power and dignity." The work undertaken by the codifiers in this chapter is a revision of a portion of part 3, chapter 8, title 13, of the Revised Statutes, relating to the contempts which infringe upon the rights or remedies of the parties and are punishable at his instance and particularly with a view to his compensation. The provisions of sections 14, 15 and 16 of the Code of Civil Procedure are as follows :

§ 14. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court, may be defeated, impaired, impeded, or prejudiced, in either of the following cases:

1. An attorney, counselor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

2. A party to the action or special proceeding, for putting in fictitious bail or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court.

3. A party to the action or special proceeding, an attorney, counselor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

4. A person, for assuming to be an attorney or counselor, or other officer of the court, and acting as such without authority; for rescuing any property or person in the custody of an officer, by virtue of a mandate of the court; for unlawfully detaining, or fraudulently and willfully preventing, or disabling from attending or testifying, a witness, or a party to the action or special proceeding, while going to, remaining at, or returning from, the sitting where it is noticed for trial or hearing; and for any other unlawful interference with the proceedings therein.

5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

6. A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding, or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court.

7. An inferior magistrate, or a judge or other officer of an inferior court, for proceeding contrary to law, in a cause or matter, which has been removed from

his jurisdiction to the court inflicting the punishment; or for disobedience to a lawful order or other mandate of the latter court.

8. In any other case, where an attachment, or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

§ 15. [*Amended, 1877.*] But a person shall not be arrested or imprisoned, for the non-payment of costs, awarded otherwise than by a final judgment, or a final order, made in a special proceeding instituted by State writ, except where an attorney, counselor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for non-attendance.

§ 16. Except in a case where it is otherwise specially prescribed by law, a person shall not be arrested or imprisoned for disobedience to a judgment or order, requiring the payment of money due upon a contract, express or implied, or as damages for non-performance of a contract.

The other provisions of the statute referred to relate to contempts of the legislature and of boards of supervisors.

LEGISLATIVE CONTEMPTS.

1 R. S. 428, § 18. Each house has the power to punish as a contempt, and by imprisonment, a breach of its privileges, or of the privileges of its members; but such power shall not hereafter be exercised, except against persons guilty of one or more of the following offenses:

1. The offense of arresting a member or officer of the house in violation of its privileges from arrest as hereinbefore stated.

2. That of disorderly conduct in the immediate view and presence of the house, and directly tending to interrupt its proceedings.

3. That of publishing any false and malicious report of the proceedings of the house, or of the conduct of a member in his legislative capacity.

4. That of refusing to attend, or be examined as a witness, either before the house or a committee, or before any person authorized by the house, or by a committee, to take testimony in legislative proceedings.

5. That of giving or offering a bribe to a member, or of attempting by menace or any other corrupt means or device, directly or indirectly, to control or influence a member in giving his vote, or to prevent him giving the same.

CONTEMPTS OF BOARDS OF SUPERVISORS.

2 R. S. 935, § 4. Whenever any person duly subpoenaed to appear and give evidence, or to produce any books and papers as herein provided, shall neglect or refuse to appear, or to produce such books and papers according to the exigency of such subpoena, or shall refuse to testify before such board or committee, or to answer any question which a majority thereof shall decide to be proper and pertinent, he shall be deemed in contempt, and it shall be the duty of the chairman of the board, or of the committee, as the case may be, to report the facts to the county judge or to a judge of the Supreme Court or of the Superior Court, or of the Court of Common Pleas of any of the cities of this State, who shall thereupon issue an attachment in the form usual in the court of which he shall be judge, directed to the sheriff of the county where such witness was required to appear and testify, commanding the said sheriff to attach such person, and forthwith bring him before the judge by whose order such attachment was issued.

§ 5. On the return of the attachment and the production of the body of the defendant, the said judge shall have jurisdiction of the matter, and the person charged may purge himself of the contempt in the same way, and the same proceedings shall be had, and the same penalties may be imposed, and the same punishment inflicted as in case of a witness subpoenaed to appear and give evidence on the trial of a civil cause before a Circuit or Special Term of the Supreme Court.

In addition to section 14, the following, among other sections of the Code, declare certain matters to be contempts. Section 853 relates to punishment of a witness for disobedience to a subpoena or order; section 874 relates to contempts for disobedience of order on deposition to be taken within the State; section 863 relates to arrest of a witness. By section 681, a sheriff may be required to return an inventory in attachment proceedings; section 688 relates to contempt proceedings on discovery. Applying to another judge, after refusal of order, is a contempt by section 778; refusal to deposit title deeds, section 717; as to waste after sale on execution, section 1443; proceedings to enforce judgment by contempt are treated by section 1241; disobedience to surrogate's decree, by section 2555; alimony, by section 1773; refusal to obey order in supplementary proceedings, by section 2457.

The right of a court of record to punish contempts is a common-law right, and a necessary incident to the powers of the court. This is specially true of contempts committed in the presence of the court, and corporations, as well as individuals, are within the scope of its powers. *People v. Sturtevant*, 9 N. Y. 263; *People v. Phelps*, 4 T. & C. 467; *Spaulding v. People*, 7 Hill, 301; *Wicker v. Dresser*, 13 How. 331; *Yates v. Lansing*, 9 Johns. 395; *People v. Albany, etc., R. R. Co.*, 12 Abb. 171; *Hillis v. Peekskill Savings Bank*, 18 Week. Dig. 287. The power to punish for contempt is, however, an exception to the provisions of the Constitution in favor of personal liberty, and cannot be extended in the least degree beyond the limits imposed by statute. *Rutherford v. Holmes*, 5 Hun, 317; affirmed, 66 N. Y. 368; *People v. Riley*, 25 Hun, 588. This summary right of the courts under the common law to punish a delinquent officer for disobedience to its lawful order has not been restricted by statute. *Clark v. Bininger*, 43 N. Y. Super. 126; affirmed, 75 N. Y. 344; *People v. Dwyer*, 63 How. 115; *Stevenson v. Hanson*, 67 id. 305. The inferior courts have power at common law to protect their proceedings from disorder, to order the arrest and removal of disorderly persons, etc., and such order exonerates the person executing it from liability for false imprison-

ment. *Matter of Watson*, 3 Lans. 408. The operation of this section is, however, specifically confined to "a court of record, or a judge thereof, or a referee appointed by the court." A judge out of court, however, has no power to punish for contempt on disobedience to an order made in a statutory proceeding before him, unless authority so to punish is expressly conferred by law. *People v. Brennan*, 45 Barb. 344. This contingency is, however, provided for by this section. It has also been said that, on the other hand, the court in term time cannot punish, as for a contempt, disobedience of an order made by a judge out of court, unless the order is made in an action pending in the court. *People v. Brennan, supra*. But in *Tremain v. Richardson*, 68 N. Y. 617, it is held that the court has power to punish for a contempt of an order made by a county judge in supplementary proceedings in the Supreme Court. The right to process to punish for contempt is within the discretion of the court, and will not be exercised where there is another adequate remedy on behalf of a party, nor is its refusal reviewable by appeal. *Troy & B. R. R. Co. v. Hoosac Tunnel R. R. Co.*, 57 How. 181. The tendency of the courts has been in modern times to restrict the definitions of contempts and narrow their own powers in respect to them. *Bergh's Case*, 16 Abb. (N. S.) 266; *People v. Jacobs*, 66 N. Y. 8. The history of punishment for contempt is considered and discussed in *Dusenbery v. Woodward*, 1 Abb. 443. Disobedience to a lawful order of a court or judge is a contempt, and an order is binding until reversed, unless void for want of jurisdiction; but if erroneous only, that fact will be considered in mitigation of the punishment. *Hilton v. Paterson*, 18 Abb. 245; *People v. Bergen*, 53 N. Y. 404; *Moat v. Halbein*, 2 Edw. Ch. 188; *People v. Sturtevant*, 9 N. Y. 263; *Sullivan v. Judah*, 4 Paige, 442; *Perry v. Mitchell*, 5 Den. 537; *Erie Railway Company v. Ramsey*, 45 N. Y. 637; *Higbie v. Edgerton*, 3 Paige, 253; *People v. Spaulding*, 2 id. 326; *Smith v. Reno*, 6 How. 124.

If a judgment is erroneous the remedy is to move to modify. *Park v. Park*, 80 N. Y. 156. That an injunction is too broad, and partially beyond the jurisdiction of the court, is no excuse as to those matters as to which the court has jurisdiction. *Atlantic & Pacific Tel. Co. v. B. & O. R. R. Co.*, 46 N. Y. Super. 377; modified, 87 N. Y. 355. But violation of a void injunction order is not a contempt. *People v. Edson*, 52 N. Y. Super. 53. Nor is it an excuse that the order is broader than the prayer of the complaint. *Mayor v. N. Y. & S. R. R. Co.*, 64 N. Y. 622; affirming 40 N. Y. Super.

301. Or that the referee before whom a debtor was to be examined was hostile to him. *Tremain v. Richardson*, 68 N. Y. 617. Nor after examination that the affidavit on which the proceedings were based was informal. *Lehmaier v. Griswold*, 46 N. Y. Super. 11. An appeal from the order, without a stay, does not justify its violation. *Stone v. Carlan*, 2 Sandf. 738; *People v. Bergen*, 53 N. Y. 404; *Leland v. Smith*, 11 Abb. (N. S.) 231; *Troy & B. R. R. Co. v. B. & H. R. R. Co.*, 57 How. 181. The direction of a third person will not protect a party from punishment, though it may bear on the extent of the punishment, as will the advice of counsel. *Krom v. Hogan*, 4 How. 225; *Matter of Fitton*, 16 id. 303; *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637; *Harley v. Bennett*, 4 Paige, 163; *Rogers v. Patterson*, id. 450; *Billings v. Carver*, 54 Barb. 40; *Lansing v. Easton*, 7 Paige, 364; *People v. Compton*, 1 Duer, 563; *Taggard v. Talcott*, 2 Edw. Ch. 628; *Hilliker v. Hathorn*, 5 Bosw. 710. The submission to an examination by a debtor, after violation, is a mitigation of punishment. *Hilton v. Patterson*, 18 Abb. 245. As to a proper excuse, see *Smith v. Drury*, 22 Week. Dig. 3. It has been intimated that the process will not ordinarily issue to collect money where there is a fund in hand out of which payment ought to be made. *Matter of Watson v. Nelson*, 69 N. Y. 536. And it is held proper only in cases where the moneys cannot be collected by execution. *Baker v. Baker*, 23 Hun, 56; *People v. Riley*, 25 id. 587; *O'Gara v. Kearney*, 77 N. Y. 423. Where the failure to pay is from inability, see *Cochran v. Ingersol*, 13 Hun, 368. But where a party is unable to pay over the moneys by reason of his own fault it is no defense. *Lansing v. Lansing*, 41 How. 248. A copy of the order or judgment must be served. *Park v. Park*, 80 N. Y. 156. And a demand must be made for payment of money to put a party in contempt. *Grey v. Cook*, 34 How. 432; *McComb v. Weaver*, 11 Hun, 271; *Fischer v. Raab*, 81 N. Y. 235. And by the person entitled to receive it. *Panton v. Zebbley*, 19 How. 394; *People v. King*, 9 id. 97; *Tinkey v. Langdon*, 60 id. 180. Until service of a copy of the order is made a party cannot be brought in contempt for not complying with its direction. *Sandford v. Sandford*, 2 State Rep. 133; *McCauley v. Palmer*, 40 Hun, 38. It must be made to appear that the act or omission complained of is one by which "the right or remedy of a party may be defeated, impaired, impeded or prejudiced," and this must be adjudged to authorize the infliction of punishment. *Fischer v. Raab*, 81 N. Y. 235. To punish a party for contempt in a civil

proceeding the contempt must be such as to defeat, impair, impede or prejudice a right or remedy of the party affected by it, and that fact must be ascertained and adjudged by the court directing the punishment which is to be imposed. *Sandford v. Sandford*, 2 State Rep. 133; *Cleary v. Christie*, 41 Hun, 566. In supplementary proceedings the judge has power to punish disobedience, and this power does not oust the court of its jurisdiction to punish for the contempt. *Matter of Smethurst*, 3 Sandf. 724; *Kearney's Case*, 13 Abb. 459. Even an erroneous order must be obeyed. *Wilcox v. Harris*, 59 How. 262. It was held that the fact that the debtor is a laborer, having a family wholly supported by his labor, will not authorize disobedience. *Newell v. Cutler*, 19 Hun, 74. This case was, however, overruled. *Hancock v. Sears*, 93 N. Y. 79. Where, pending the proceedings, the debtor allows a fictitious judgment to be rendered against him, and execution to be levied on land belonging to him in another State, he is punishable for contempt. *Fenner v. Sanborn*, 37 Barb. 610. A party will not be punished for refusing to pay over money or deliver property, pursuant to an order, unless the money or specific property was, at the time of the service of the order for the examination, in his possession or under his control. *Tinker v. Crooks*, 22 Hun, 579; *Potter v. Low*, 16 How. 549; *Gerregani v. Wheelright*, 3 Abb. (N. S.) 264. Repayment of funds received by a party to an action for a partnership accounting from a receiver therein cannot, upon reversal of the judgment under which it was paid, be recovered back by proceedings for contempt. *Schulte v. Anderson*, 48 N. Y. Super. 133. An assignee for the benefit of creditors cannot, like a receiver, be punished for contempt for not complying with an order to pay out moneys in his hands. *Matter of Radtke*, 16 Week. Dig. 28. An order should not be granted for the arrest and imprisonment of a party who had obtained an attachment against property for his failure to pay the sheriff's charges, as fixed by an order vacating the attachment. *Hall v. U. S. Reflector Co.*, 66 How. 31. See *Myers v. Becker*, 95 N. Y. 486. A final decree on an accounting by a general assignee cannot be enforced by proceedings for contempt. *Matter of Stockbridge*, 7 Abb. N. C. 395.

A third party will not be punished for refusing to comply with an order that he turn over property of the judgment debtor in his hands to the receiver, the receiver must bring suit. *West Side Bank v. Pugsley*, 12 Abb. (N. S.) 28; S. C., 47 N. Y. 368. Disobedience to an injunction order will be punished as a contempt, and it is not necessary that service of the order should have been made if the per-

son violating it has knowledge it has been granted. *Mayor v. N. Y. & S. I. Co.*, 40 N. Y. Super. 300; affirmed, 64 N. Y. 623; *People v. Brower*, 4 Paige, 405; *Neale v. Osborne*, 15 How. 81; *Wheeler v. Gilsey*, 35 id. 139; *Atlantic Tel. Co. v. Baltimore, etc., R. R. Co.*, 46 N. Y. Super. 377; *Ewing v. Johnson*, 34 How. 202; *Waffle v. Vanderheyden*, 8 Paige, 45. But damages may be recovered in an action for such violation, or proceedings taken for contempt, at the election of the injured party. *Porous Plaster Co. v. Seabury*, 43 Hun, 611. The court will not countenance any evasion of the injunction order, and will punish an intentional violation of its fair intent. *Mayor v. N. Y. & S. I. R. R. Co.*, 64 N. Y. 622; *Ogden v. Gibbons*, 4 Johns. Ch. 174; *Devlin v. Devlin*, 69 N. Y. 212; *Neale v. Osborne*, 15 How. 81; *Wheeler v. Gilsey*, 35 id. 139. Service on the mayor of a city or president of a corporation binds the officers of each. *People v. Sturtevant*, 9 N. Y. 263; *Rorke v. Russell*, 2 Lans. 242. Officers of a corporation who have personal knowledge that a corporation is enjoined, and nevertheless violate the injunction, are punishable. *Abell v. N. Y., etc., R. R. Co.*, 18 Week. Dig. 554; *People v. Albany, etc., R. R. Co.*, 12 Abb. 171. But the order must clearly embrace the act complained of to entitle the person injured to process for contempt. *German Savings Bank v. Habel*, 58 How. 336; *Kennedy v. Weed*, 10 Abb. 62. To render a person guilty of a contempt for resisting "a lawful mandate of a court of record," the mandate must have been issued by a court and not by a justice thereof. *People v. Gilmore*, 26 Hun, 1. A peremptory *mandamus* is an order of the court. *People v. R. & S. L. R. R. Co.*, 76 N. Y. 294. It is sufficient excuse when an act has been directed by *mandamus* to show that an injunction has been granted restraining the same act. *People v. Village of West Troy*, 25 Hun, 179. Unless the order directs surrender of premises, as well as a conveyance, a party cannot be punished for refusing to deliver possession. *Tinkey v. Langdon*, 60 How. 180; *McKelsey v. Lewis*, 3 Abb. N. C. 61. A person sued by a wrong name will not be punished for contempt for failing to obey an order if he has not appeared in the action. *Muldoon v. Pierz*, 1 Abb. N. C. 309. It is not a contempt to fail to pay costs in an action between husband and wife, as costs are collectible by execution. *Noland v. Noland*, 29 Hun, 630; *Jacquin v. Jacquin*, 36 id. 378. But when a defendant fails to make a payment of alimony he is liable for contempt. It is not necessary to show an execution returned unsatisfied. *Ryckman v. Ryckman*, 34 Hun, 235; affirmed, 98 N. Y.

639. The rule is changed from the Revised Statutes, and the court must be satisfied that payment cannot be compelled by sequestration or requiring security before proceedings can be taken for contempt. *Isaacs v. Isaacs*, 61 How. 369; *Rahl v. Rahl*, 14 Week. Dig. 560. It was held before the Code, *Matter of Clark*, 20 Hun, 551; appeal dismissed, 81 N. Y. 638, that one committed for non-payment of alimony was not entitled to the jail liberties. The payment of alimony, either temporary or permanent, and of the wife's legal expenses in an action for divorce, may be enforced by proceedings for contempt, but the husband must be served with a certified copy of the decree and payment of the alimony demanded before the proceedings can be had. *Strobridge v. Strobridge*, 21 Hun, 288; *Ryckman v. Ryckman*, 19 Week. Dig. 41; *Sandford v. Sandford*, 2 State Rep. 133; contra, *Gane v. Gane*, 45 N. Y. Super. 355. To bring a party into contempt, the order which he is charged with violating must be served personally upon him. *McCauley v. Palmer*, 40 Hun, 38; *Loop v. Gould*, 17 id. 585; *Gerard v. Gerard*, 2 Barb. Ch. 73; *People v. Murphy*, 1 Daly, 462. It is no answer to the proceedings for contempt that the pecuniary circumstances of the defendant are such that he is unable to comply with the order. *Lansing v. Lansing*, 41 How. 248; *Strobridge v. Strobridge*, *supra*. An injunction restraining a party from suing executors is not violated by suing heirs at law. *Dale v. Roosevelt*, 1 Paige, 35. After service of an ordinary injunction in a creditor's suit, defendant is not guilty of contempt in proceeding to judgment in a suit already commenced. *Parker v. Wakeman*, 10 Paige, 485.

An injunction obtained by a partner, preventing other partners from meddling with the partnership property, will not prevent the creditors of the firm from proceeding at law to recover their debts, or an injunction of the firm from confessing a judgment, so as to give a creditor a preference. *McCredie v. Senior*, 4 Paige, 378. An attorney having two clients, if one is enjoined, it does not limit his professional action as to the other claiming different rights and interests. *Slater v. Merritt*, 75 N. Y. 268. Among the acts adjudged to be contempts are the taking of property from an officer when seized on mesne, but not on final process. *People v. Church*, 2 Wend. 262. Breaking open parts of books sealed up and delivered to a party for inspection. *Dias v. Merle*, 2 Paige, 494. Writing an insulting letter to a grand jury. *Bergh's Case*, 16 Abb. 266. Interfering with property in the possession of a receiver. *Riggs v.*

Whitney, 15 Abb. 388; *Noe v. Gibson*, 7 Paige, 513. See on this point, also *Albany City Bank v. Schemerhorn*, 9 Paige, 372; *Baker v. Browning*, 8 id. 388; *Hilliker v. Hathorne*, 5 Bosw. 710; *Seu Ins. Co. v. Stebbins*, 8 Paige, 565. Procuring an insolvent person to justify as bail. *Hall v. L'Platimer*, 49 How. 500. Bringing a suit against a lunatic or habitual drunkard after notice of injunction, or against a receiver. *L'Amoreux v. Crosby*, 2 Paige, 422; *Riggs v. Whitney*, 15 Abb. 388; *Noe v. Gibson*, 7 Paige, 513. See *People, ex rel. Borst, v. Grant*, 41 Hun, 351. The surrogate has power to punish an administrator for contempt, because of his failure to pay the amount allowed to a special guardian by a decree, and an allegation of inability to pay is no answer. *Matter of Kurtzman*, 2 State Rep. 655. As to when surrogate can exercise discretion. *Matter of Snyder*, 2 State Rep. 758. Sureties willfully justifying in a larger sum than they are worth are guilty of contempt. *Egan v. Hope*, 49 N. Y. Super. 454; *Stephenson v. Hanson*, 6 Civ. Pro. 43; reversed on appeal on ground facts, did not justify finding of falsity of affidavit, 22 Week. Dig. 274; *Keating v. Goddard*, 8 Civ. Pro. 377, n.; *Diamond v. Knoepfel*, 3 State Rep. 291. But contra, *Simon v. Aldine Co.*, 5 id. 906. But not if error might have been made by supposing demands against him not collectible. *Nathan v. Hope, supra*. Refusal to answer by a witness is not less punishable civilly, because it might be punished criminally. *Matter of Jones*, 6 Civ. Pro. 250. But although a witness will be compelled to answer, he will not be obliged to sign a deposition when it might subject him to legal liability. *Marx v. Spaulding*, 6 State Rep. 530. It seems that where a judgment of divorce prohibits the party in fault from marrying again, he may be punished for contempt for disregarding the provision by afterward marrying in another State. *Ryer v. Ryer*, 67 How. 369. A surrogate has no jurisdiction to punish for contempt in not complying with a decree directing the payment of money until an execution has been returned unsatisfied in whole or part. *Matter of Dissoway*, 91 N. Y. 235. A sheriff who has acted in good faith should not be punished as for contempt for a mistake of law. *Second National Bank of Oswego v. Dunn*, 63 How. 434. The interposition of a verified answer by a defendant, knowing it to be false, is not a contempt. *Moffatt v. Herman*, 17 Abb. N. C. 107; reversing id. 62. See *People, ex rel. Munsell, v. Court of Oyer and Terminer*, 101 N. Y. 245, for discussion as to contempt in view of court. An answer may be stricken out for refusal to obey an order of the court. *Clark*

v. *Clark*, 1 State Rep. 287; *Clark v. Clark*, 11 Civ. Pro. 7. When judgment enforced by proceedings for contempt. *Diffenbach v. Roch*, 22 Week. Dig. 282.

Enforcement of judgments for contempt.—The provisions of section 1241 are here inserted for convenience of reference.

§ 1241. In either of the following cases, a judgment may be enforced, by serving a certified copy thereof, upon the party against whom it is rendered, or the officer or person, who is required thereby, or by law, to obey it; and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court:

1. Where the judgment is final, and cannot be enforced by execution, as prescribed in the last section.

2. Where the judgment is final, and part of it cannot be enforced by execution, as prescribed in the last section; in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.

3. Where the judgment is interlocutory, and requires a party to do, or to refrain from doing an act; except in a case specified in the next subdivision.

4. Where the judgment requires the payment of money into court, or to an officer of the court; except where the money is due upon a contract, express or implied, or as damages for non-performance of a contract. In a case specified in this subdivision, if the judgment is final, it may be enforced as prescribed in this section, either simultaneously with, or before or after the issuing of an execution thereupon, as the court directs.

The provisions of section 1241 are not imperative; the judgment creditor has no claim *de jure* that the power should be exercised; its exercise is discretionary with the court below. *Cochran's Executor v. Ingersoll*, 73 N. Y. 613. The cases where disobedience to a judgment may be punished as a contempt are, where it cannot be enforced by execution, or where it directs the payment of money into court, or to an officer of the court. *O'Gara v. Kearney*, 77 N. Y. 423. A surety on an administrator's bond, who, after an unsatisfied decree against him, and a judgment on the bond, has paid the amount, has a right to an attachment against the administrators; the judgment on the bond did not take away any remedy on the principal debt, and attachment and execution may be used concurrently. This decision under R. S. *Townsend v. Whitney*, 75 N. Y. 425. Where a judgment adjudges the payment of a sum to a creditor from the surplus income of a trust estate, the trustee is, after demand, personally liable, and precept may be issued to collect the amount on motion, on its being shown that he has paid the amount over on another judgment. *Williams v. Thorn*, 81 N. Y. 381. When a judgment requires a party to execute a conveyance, and an instrument in proper form is tendered him, he is bound to execute it, though it has not been submitted to the court for approval, and it need not be tendered simultaneously with service of a

copy of the judgment. *Hilliker v. Hathorne*, 5 Bosw. 710; *Morris v. Walsh*, 9 id. 636.

For contempts in supplementary proceedings, see section 2457.

§ 2457. A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee, made pursuant to the last two sections, or to any other provision of this article, and duly served upon him, or an oral direction, given directly to him by a judge or referee, in the course of the special proceeding; or to attend before a judge or referee, according to the command of a subpoena, duly served upon him; may be punished by the judge, or by the court out of which the execution was issued, as for a contempt.

The irregularity of an order is no excuse for a debt or refusing to appear and answer, and he will be punished for contempt though the order be afterward set aside for irregularity. *Shultz v. Andrews*, 54 How. 378. But see *Hancock v. Sears*, 93 N. Y. 79. A debtor must obey the order even though not originally served with summons. *Keller v. Zeigle*, 5 Law Bull. 15; *Perkins v. Kendall*, 3 Civ. Pro. 240. The debtor is bound to obey the order of a referee as to adjournments, and will be guilty of contempt if he refuses. *Redmond v. Goldsmith*, 2 Law Bull. 19. A third person will not be punished for contempt for not appearing where the allegations as to property in his possession were on information and belief. *Day v. Lee*, 52 How. 95. And so as to a third person if execution had not been returned unsatisfied. *Sloane v. Higgins*, 1 Law Bull. 59. It is a contempt for the debtor to refuse to answer a question held proper by the referee, and which he is directed to answer. *Lathrop v. Clapp*, 40 N. Y. 328. To put a judgment debtor in contempt for interfering with his property, it must affirmatively appear that the property in question was acquired prior to the granting of the order. *Potter v. Low*, 16 How. 549. A transfer of property in payment of counsel fees is a contempt. *Deposit National Bank v. Wickham*, 44 How. 421. As is a payment of rent. *Aschemorr v. Emont*, 6 Law Bull. 81. To draw money deposited in the name of the debtor as trustee, after service of an injunction, even though it is the property of his wife. *People v. Kingsland*, 3 Keyes, 325. But in *Dean v. Hyatt*, 5 Week. Dig. 67, it is held the legal title to the property, the transfer of which constitutes the contempt, must have been in the debtor. Where an order has been made to pay over, which it is shown ought not to have been made, a party will not be punished for disobedience if there was no disrespect. *Beebe v. Kenyon*, 3 Hun, 73.

Contempts of surrogates' decrees.—The following section of the Code regulates the practice :

§ 2555. In either of the following cases, a decree of a Surrogate's Court, directing the payment of money, or requiring the performance of any other act, may be enforced, by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or willfully neglects to obey it, by punishing him for a contempt of court: 1. Where it cannot be enforced by execution, as prescribed in the last section. 2. Where part of it cannot be so enforced by execution; in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section. 3. Where an execution, issued as prescribed in the last section, to the sheriff of the surrogate's county, has been returned by him wholly or partly unsatisfied. 4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper. If the delinquent has given an official bond, his imprisonment, by virtue of proceedings to punish him for a contempt, as prescribed in this section, or a levy upon his property by virtue of an execution, issued as prescribed in the last section, does not bar, suspend, or otherwise affect an action against the sureties in his official bond.

The provisions of section 2555 do not apply to the enforcement of a decree rendered prior to September 1, 1880. *Underhill v. Nichols*, 4 Redf. 318; *Woodhouse v. Woodhouse*, 5 id. 131; *Joel v. Ritterman*, id. 136. Where an executor was indebted to his testator, and after assuming charge of the estate became insolvent, having accounted, however, for all moneys of the estate received by him, it was held he was not amenable to contempt proceedings for failure to pay the debt. The provisions of the Code were passed to permit the punishment, by contempt proceedings, of trustees who had embezzled the funds of *cestuis que trust*, and do not change the character of a contract debt due from the executor. *In re Rugg*, 3 State Rep. 224; citing *Baucus v. Stover*, 89 N. Y. 1. It is said by Livingston, surrogate, in *Ferguson v. Cummings*, 1 Dem. 433, that the powers conferred by section 2555 should be exercised in conformity with the liberal spirit of State legislation on the subject of imprisonment for debt. The holding *In re Dissoway*, 91 N. Y. 235, that contempt proceedings cannot be taken to enforce a decree for payment of money until an execution has been returned unsatisfied, wholly or in part, relates to proceedings defined by the first three subdivisions of the section, and the provisions of section 4 do not require an execution against an executor, etc., but it is held in *Estate of Kellinger*, 2 McCarty's Civ. Pro. 68, that it is discretionary with the surrogate in such case whether to require the issue and return of an execution; and *Ferguson v. Cummings*, 1 Dem. 433, holds that the issuing of an execution ought not, in the exercise of a sound discretion, to be dispensed with. An administrator

ordered to pay costs cannot excuse non-payment by showing he has no assets, *non constat*, but that he has squandered them. *Gillies v. Kreuder*, 1 Dem. 349. As to insufficiency of assets, the surrogate exercises a discretion in deciding the fact on conflicting evidence. *Matter of Snyder*, 2 State Rep. 758. In *Matter of Kurtzman*, 2 id. 655, it is said that whatever doubt there may have been before the Code, as to the right of a surrogate to punish an administrator for contempt, for non-payment of moneys, there can no longer be any doubt as to such power and its extent. The claim of an executor that he has no funds is too general, and is unavailing. Citing *Matter of Snyder*, 34 Hun, 302; *Matter of Steinert*, 29 id. 301. The liability of an executor who was indebted to his testator is not the same as if he had received assets of the estate, and if unable to pay, he cannot be punished for contempt. *Baucus v. Stover*, 89 N. Y. 1. The decisions under the Revised Statutes as to power of surrogate to punish for non-payment of moneys were very conflicting. See *Watson v. Nelson*, 69 N. Y. 536; *People v. Cowles*, 4 Keyes, 46; *Seaman v. Duryea*, 11 N. Y. 324; *Townsend v. Whitney*, 75 id. 425.

Miscellaneous.—In general, if a party stipulates in open court to pay the expenses of a reference, and he is ordered to pay and refuses, giving no satisfactory reason, he may be punished for contempt. *Fischer v. Raab*, 56 How. 218; affirmed, 58 id. 221; *People v. Reilly*, 56 id. 223. Bringing an action in the name of another person, without his privity or consent, is a contempt. *Butterworth v. Stagg*, 2 Johns. Cas. 291.

An attorney employed in that capacity who collects or receives money for his client and refuses to pay it after demand made over, is punishable as for a contempt. *Matter of Bleakly*, 5 Paige, 311; *Matter of Dakin*, 4 Hill, 42; *Wilmerdings v. Fowler*, 14 Abb. (N. S.) 249; *People v. Smith*, 3 Cai. 221; *People v. Wilson*, 5 Johns. 365; *Bohanan v. Peterson*, 9 Wend. 503; *Ex parte Ferguson*, 6 Cow. 596; *Matter of Steinert*, 24 Hun, 246; *Ex parte Staats*, 4 Cow. 76. An attorney is also liable for contempt for appearing for a defendant and confessing judgment without authority. *Denton v. Noyes*, 6 Johns. 296. But a client will not be punished for an act done by his attorney without his privity, procurement or consent. *Satterlee v. DeComeau*, 7 Robt. 666. A receiver who refuses to pay out funds in his hands, pursuant to an order of the court, is punishable as for a contempt. *Clark v. Binninger*, 43 N. Y. Super. 126, 344; affirmed, 75 N. Y. 344. A sheriff is liable to

attachment for not returning process. *People v. Brown*, 6 Cow. 41. Or for an insufficient return, with intent to favor defendant. *Burk v. Campbell*, 15 Johns. 456. A witness is liable for contempt for refusing to attend court, and it need not appear that such conduct was calculated to, or did, impair the rights or remedies of the parties complaining thereof. *Bleecker v. Carroll*, 2 Abb. 82; *Woods v. DeFiganiere*, 1 Robt. 607. In proceedings to examine a witness before trial, it must appear, to put him in contempt, that the order prescribed by section 873 has been served on him. *Loop v. Gould*, 17 Hun, 585; *Tebo v. Baker*, 16 id. 182. The court is to decide as to whether a question put to a witness is proper, and that question cannot be inquired into, to impeach a commitment for contempt. *People v. Cassels*, 5 Hill, 164; *People v. Sheriff*, 7 Abb. 96; *Forbes v. Meeker*, 3 Edw. 452. As to the power of a legislative body to commit for contempt, see *The People, ex rel. McDonald, v. Keeler*, 99 N. Y. 465, which is an exhaustive review of the authorities, and the latest expression of the court of last resort on this question.

A witness is not guilty of a contempt in refusing to testify to a fact which would subject him to a penalty or forfeiture. *Henry v. Salina Bank*, 1 N. Y. 83. Nor is a county treasurer bound to answer an interrogatory put to him by a committee appointed by a board of supervisors concerning moneys in his hands as such treasurer. *In re Dickinson*, 56 How. 260. A witness is not bound to answer a question tending to disgrace or criminate himself. *In re Lewis*, 39 How. 155; *Lohman v. People*, 1 N. Y. 379; *People v. Rector*, 19 Wend. 569; *People v. Herrick*, 13 Johns. 82. The privilege is, however, personal to the witness. *Brandon v. People*, 42 N. Y. 265; *Southard v. Rexford*, 6 Cow. 254; *Ward v. People*, 6 Hill, 144. By statute, communications between attorney and client, between physician and patient, and between clergyman and layman, are confidential; also between husband and wife.

§ 2267. Where the offense is committed in the immediate view and presence of the court, or of a judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose an order must be made by the court, judge or referee, stating the facts which constitute the offense, and bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor.

A plain line of distinction is drawn between proceedings for a contempt occurring in the presence of a judge, and the facts constituting which are certified by him, and cases of professional misconduct out of the presence of the court, where the actual truth

is a matter of evidence. In the former class of cases it is held that the facts embodied in the order of the judge must be taken as true. In the latter the right of review is asserted, not only where there had been want of jurisdiction, but where the court below had decided erroneously on the testimony. Its discretion is not unlimited, and while not to be overruled in cases of doubt, is yet subject to review. *Matter of Eldridge*, 82 N. Y. 161. As to what constitutes a criminal contempt, see *People v. Oyer and Terminer*, 101 N. Y. 245. An order made by the court is a sufficient commitment where the contempt has been committed in the presence of the court, and it appears it should direct the sheriff to take him into custody and confine him, and interrogatories do not seem to be necessary. *Matter of Percy*, 2 Daly, 530. Where a witness summoned before the grand jury declined to answer, and after the court had ruled the question proper he repeated his refusal, it was held to be a contempt in the immediate view and presence of the court, so that no affidavit or further evidence was needed for commitment. *Matter of Hackley*, 24 N. Y. 74. In the latter case no interrogatories were propounded, and the following precedent was held sufficient. It will be noted it was a case of criminal contempt.

Precedent for Order for Commitment.

At a Court of General Sessions of the Peace, holden in and for the city and county of New York, etc., April 30, 1861:
Present—John T. Hoffman, *Recorder*.

In the Matter of Andrew J. Hackley. }

The grand jury heretofore in due manner selected, drawn, summoned and sworn to serve as grand jurors in the Court of General Sessions of the Peace in and for the city and county of New York, come into court and make complaint, by and through their foreman, theretofore duly appointed and sworn, that Andrew J. Hackley, after being duly summoned and sworn, as prescribed by law, as a witness in a certain matter and complaint pending before such grand jury, whereof they had cognizance, against certain aldermen and members of the common council of the city of New York for feloniously receiving a gift of money, under an agreement that their votes should be influenced thereby in a matter then pending before said aldermen and members of the common council in their official capacity, did then and there refuse to answer the following legal and proper interrogatory propounded to him, the said Andrew J. Hackley, to-wit: "What did you do with the pile of bills received from Thomas Hope, and which he told you amounted to \$50,000?"

And the said Andrew J. Hackley then and there, instead of answer-

ing the said interrogatory, stated as follows, to-wit: "Any answer which I could give to that question would disgrace me, and would have a tendency to accuse me of a crime. I, therefore, demur to the question, referring to the ancient common-law rule, that no man is held to accuse himself, and to the sixth section of the first article of the Constitution of this State."

And the court having then and there decided that the said interrogatory is a legal and proper one, and that the reasons given for not answering the same are invalid and insufficient; and now ordering the said Andrew J. Hackley to answer the said interrogatory, and he, the said Andrew J. Hackley, still contumaciously and unlawfully refusing to answer the said interrogatory, the court doth hereby adjudge the said Andrew J. Hackley, by reason of the premises aforesaid, guilty of criminal contempt of court; and doth further order and adjudge that the said Andrew J. Hackley, for the criminal contempt aforesaid, whereof he is convicted, be imprisoned in the jail of the county of New York for the term of thirty days.

§ 2268. Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

Before an attachment can issue for non-compliance with a judgment or order it must be distinctly settled by the court or referee what the party can properly be required to do. *Sutton v. Davis*, 6 Hun, 237; appeal dismissed, 64 N. Y. 633; *People v. Alexander*, 3 Hun, 211. A precept under this section may be issued *ex parte*, and without reference to the ability of the party to pay the money, and whether his disobedience was willful or not. *People v. Coules*, 4 Keyes, 38; *In re Kelly*, 62 N. Y. 198; *Clark v. Bininger*, 75 id. 344. A demand is necessary before contempt proceedings can be taken under this section by the person entitled to the moneys, or some person authorized by him, and it is properly made of the person sought to be punished. If this is not done proceedings will be set aside. *Fischer v. Raab*, 58 How. 221. Where a receiver willfully refused to obey an order of the court directing him to pay over moneys in his hands as such, it is the proper practice to grant an order to show cause, and give the receiver an opportunity to be heard; and there must be an adjudication that he is guilty of misconduct before he can be punished. So held under Revised Statutes. *Clark v. Bininger*, 75 N. Y. 344. See section 2269 for form of affidavit.

Precedent for Warrant to Commit.

The People of the State of New York to the Sheriff of the County of Albany, greeting :

WHEREAS, By affidavit of John Cromwell, it appears that on the 5th day of May, 1887, an order was granted in the Supreme Court commanding Marinda Wheeler to appear and answer concerning her property in an action in which John Cromwell was plaintiff and said Marinda Wheeler defendant, in which an execution had issued to the sheriff of Albany county, where said Marinda Wheeler then resided, on a judgment obtained against her in the Supreme Court in said county for the sum of \$2,150 in said action, which judgment had been duly docketed; and

WHEREAS, The said Marinda Wheeler appeared before Charles J. Buchanan, Esq., a referee appointed for that purpose, and answered concerning her property; and

WHEREAS, It appeared that she had in her hands the sum of \$850, applicable to the payment of said judgment, and an order was duly made on the 1st day of June, 1887, commanding and directing her, the said Marinda Wheeler, to pay over said sum to said plaintiff on said judgment, or that in default thereof an attachment issue; and

WHEREAS, The said order was duly served on said Marinda Wheeler on the 3d day of June, 1887, and the said moneys demanded by the plaintiff, as appears by due proof thereof, and the said Marinda Wheeler neglected and refused, and still neglects and refuses, to pay over said moneys or any part thereof: Now, therefore, we command you to arrest the said Marinda Wheeler, if she shall be found in your bailiwick, and commit her to the county jail of Albany county, until the said sum of \$850 is paid. You are to make return under your hand of the manner in which you have executed this writ, and have you then and there this writ.

Witness, Hon. A. B. Parker, Justice of the Supreme Court, Albany,
[L. s.] June 5, 1887.

E. D. RONAN,
Attorney for Plaintiff.

ROBERT H. MOORE,
Clerk.

Indorsed:—"Let the within writ of attachment issue."

A. B. PARKER,
Justice Supreme Court.

The warrant should be accompanied by a formal order as follows:
At a Special Term of the Supreme Court, held at the court-house in the city of Albany, on the 5th day of June, 1887:
Present — Hon. A. B. Parker, *Justice.*

The People, *ex rel.* John Cromwell,
agst.
Marinda Wheeler.

It appearing by the report of Charles J. Buchanan, Esq., the referee in supplementary proceedings in this action, and the affidavit of John

Cromwell, plaintiff, that the defendant has in her possession, applicable to the payment of the judgment herein, the sum of \$850, which she refuses to apply thereon, although ordered so to do, and proof of service of such order and demand of payment having been made and filed:

Now on motion of E. D. Ronan, attorney for plaintiff, it is ordered, that a warrant issue against said Marinda Wheeler, as for a contempt, under and by virtue of section 2268 of the Code of Civil Procedure to commit her to prison till said sum is paid.

Enter in Albany county.

A. B. PARKER,

Justice Supreme Court.

§ 2269. The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either of the last two sections; and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either:

1. Make an order, requiring the accused to show cause before it or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

There must be an affidavit in civil cases the statute is express. *Ackroyd v. Ackroyd*, 3 Daly, 38. The party is brought into court by attachment either absolute or *nisi*. *Jackson v. Smith*, 5 Johns. 117; *Matter of Smethurst*, 2 Sandf. 724; *Matter of Vanderbilt*, 4 Johns. Ch. 57. The proceeding may be by attachment for contempt, or order to show cause why the party should not be punished for contempt. In either case it must be shown that the party is in contempt, and where the proceeding is by order to show cause the papers on which the application is founded, or so much of them as are not already in possession of the accused, must be served on him or his solicitor, such length of time before the hearing, as the order directs. The service of a mere notice of motion is not sufficient; the party must be brought into court by the service of an order to show cause or an attachment. *Sandford v. Sandford*, 40 Hun, 540. Either an attachment must issue or an order be granted to show cause why the party should not be punished for misconduct, otherwise the proceedings are invalid. *Fall Brook Co. v. Heckscher*, 6 State Rep. 676. If a party fails to appear, or shows no sufficient cause, the court may make a final order of punishment for contempt. If the contempt is denied the court may discharge the order to show cause or require interrogatories on the coming in of which the court acts. So where the procedure is by attachment, there must be interroga-

tories, unless the accused admit the contempt as charged. *Albany City Bank v. Schemerhorn*, 9 Paige, 372. Where the proceeding is commenced by notice of motion, instead of an order to show cause, or by an attachment, the irregularity is cured by appearing and answering without objection. An attachment has been granted in the first instance where an evasive return was made to writ of *habeas corpus*. *Matter of Stacy*, 10 Johns. 328. For enforcing an answer in equity where the witness positively refuses to obey a subpoena. *Andrews v. Andrews*, 2 Johns. Cas. 109; also, see *People v. Wilson*, 5 Johns. 368; *Stafford v. Hasketh*, 1 Wend. 71; *Worden v. Bank of Orange*, id. 94. The order to show cause should not be an adjudication that the defendant is guilty of the contempt, but only an order to bring him into court. *McCredie v. Senior*, 4 Paige, 378.

It is said in *People v. King*, 9 How. 97, that an attachment should issue at once on violation of an order to pay over money. A warrant of attachment should not be granted *ex parte*, when the only proof is by an adverse party on information and belief; no excuse is offered by the affidavits of parties having knowledge if the facts are not produced. *Sargeant v. Warren*, 22 Week. Dig. 472. In contempt proceedings, to collect a personal tax, a notice of motion was held proper. *Matter of Nichols*, 54 N. Y. 62. But see language of section as it now stands, and *Sandford v. Sandford*, *supra*. Attachment is the remedy against an attorney who refuses to pay over money which belongs to his client. *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489. The discretion of a judge in fixing time within which an attachment is returnable is in the discretion of the court, but reviewable at General Term. The attachment should be returnable before the judge by whom it is granted. But error is amendable, and is waived by giving a bond to the sheriff, at least so far as the validity of the bond is concerned. *Kelly v. McCormick*, 28 N. Y. 318; *Power v. Village of Athens*, 19 Hun, 169. It was held in *Dunford v. Weaver*, 84 N. Y. 445, that the process need not recite all the facts and proceedings necessary to confer jurisdiction; and in *Park v. Park*, 80 N. Y. 156, it was held that where there was an indorsement on the process signed by the clerk, showing it was issued by special order of the court, it would be presumed an order had been entered, but in any event, as the objection was not raised below, it could not be raised in Court of Appeals. Much conflict is found in the decisions previous to the Code of Civil Procedure, as to whether the proceedings should be entitled, as in

the action or proceeding in which the contempt originated, or as a new special proceeding. This question is definitely settled by section 2273, which provides that a warrant of attachment is a mandate whereby an original special proceeding is instituted against the accused in behalf of the people, upon the relation of the complainant. In following the precedents hereafter in entitling papers, this distinction must be carefully borne in mind, and the title must be adapted as to the original action or a new proceeding, as it may be commenced by warrant or order, up to the time of the issuing of the warrant. It then becomes a special proceeding, and must be so entitled, however commenced. *Matter of Dissoway*, 91 N. Y. 235. It, however, leaves open the question as to how the order should be entitled which directs the warrant to issue. It would seem proper to entitle the papers up to the warrant in the original suit and proceeding. See *Folger v. Hoogland*, 5 Johns. 235; also *Erie R. R. Co. v. Ramsey*, 45 N. Y. 637, and *Sudlow v. Knox*, 7 Abb. (N. S.) 411, Court of Appeals.

Precedent for Affidavit.

ULSTER SURROGATE'S COURT.

In the Matter of the Estate of John J. Ferris, deceased.

To the Surrogate's Court of the County of Ulster :

The petition of Theophelia G. Townsend, of Newburgh, shows that she was a legatee under the will of John J. Ferris, deceased, late of said county.

That said proceedings were had in the estate of said deceased; that one Oliver B. Whitney was duly appointed executor thereof on the 10th day of May, 1884, and entered on the duties of his trust and acted as such; that on the 12th day of July, 1886, he made and filed his account as such executor in Ulster Surrogate's Court, on notice to all parties interested, and a decree was duly entered in said Surrogate's Court, on such judicial settlement, in and by which your petitioner was adjudged to be entitled to receive the sum of \$1,200 as and for her said legacy, and said Oliver B. Whitney was directed to pay the same out of funds found to be in his hands as such executor. That said decree was duly docketed in Ulster county clerk's office, and execution issued thereon to the sheriff of Ulster county, where said Whitney then resided and now resides, and was returned wholly unsatisfied. That thereupon a certified copy of said decree of Ulster Surrogate's Court was served on said Whitney by the husband of your petitioner, proof of which is hereto annexed, and payment of said moneys demanded on behalf of your petitioner.

That said Whitney refused and neglected, and still refuses and neglects, to pay over said moneys, or any part thereof, and your peti-

tioner, therefore, prays that a warrant issue out of and under the seal of this court, directed to the sheriff of the county of Ulster, commanding him to arrest the said Oliver B. Whitney, and bring him before this court forthwith, or at a time to be specified, to answer for his said offense.

THEOPHELIA G. TOWNSEND.

(Add verification.)

Precedent for Order to Show Cause.

Caption.

ULSTER SURROGATE'S COURT.

In the Matter of the estate of John
J. Ferris, deceased.

On reading and filing the verified petition of Theophelia G. Townsend, showing that by a decree granted in this matter in this court on the 12th day of July, 1886, Oliver B. Whitney, executor of John J. Ferris, deceased, was adjudged to pay over to her the sum of \$1,200, from funds in his hands, that he has failed so to do after service of copy of decree, and demand duly made, and that execution thereon has been returned unsatisfied:

Now, on motion of Walter S. Fredenburgh, attorney for petitioner, it is ordered that said Oliver B. Whitney show cause, at a term of this court, to be held at the surrogate's office, in the county of Ulster, on the 10th day of April, 1887, at ten o'clock, A. M., why he should not be punished for such alleged offense.

ALVAH S. NEWCOMB,

Clerk of the Surrogate's Court.

An order to show cause to punish for a contempt, made by a county judge, returnable after expiration of his term of office, may be heard and decided by his successor in office. *Ganeman v. Berry*, 34 Hun, 138.

Precedent for Warrant to Attach.

The People of the State of New York to the Sheriff of the county of Ulster, greeting:

WHEREAS, It appears by the verified petition of Theophelia G. Townsend, that in and by a decree of this court, duly made and entered on the 12th day of July, 1886, Oliver B. Whitney, of the town of Marlborough, in the county of Ulster, was adjudged and directed to pay over to said petitioner the sum of \$1,200, being the amount of a legacy due her under the will of John J. Ferris, deceased, and that the said Oliver B. Whitney holds said moneys as executor of said Ferris; that a copy of said decree has been duly served upon him and demand of payment of said legacy made from him, and also that an execution duly issued on said decree has been returned wholly unsatisfied, and that the said sum of \$1,200 remains wholly unpaid, and the said Oliver B. Whitney neglects and refuses to pay

over the same or any part thereof: Now, therefore, we command you to arrest the said Oliver B. Whitney, if he shall be found in your bailiwick, and bring him before a Surrogate's Court, to be held at the surrogate's office, in the city of Kingston, on the 10th day of April, 1887, at ten o'clock in the forenoon of that day, to answer unto us for his alleged offense in refusing to pay over said legacy due, and directed to be paid as aforesaid, to Theophelia G. Townsend, the petitioner, and you are to make return on that day to the said Surrogate's Court, by a certificate under your hand of the manner in which you have executed this writ, and have you then and there this writ.

Witness, Hon. O. P. Carpenter, surrogate at the city of Kingston, on the 1st day of April, 1887.

WALTER S. FREDENBURGH,
Attorney for Petitioner.

O. P. CARPENTER,
Surrogate.

Indorsed pursuant to section 2275, as follows:—"Let the said Oliver B. Whitney give an undertaking for his appearance to answer upon the within attachment in the sum of \$2,400."

O. P. CARPENTER,
Surrogate.

§ 2270. Where it is prescribed by law, or by the general rules of practice, that a notice may be served in behalf of a party, upon a sheriff or other person, requiring him to return a mandate, delivered to him, or to show cause, at a term of a court, why he should not be punished, or why an attachment should not be issued against him, for a contempt of the court; the party, in whose behalf the notice is served, may, at the time specified therein, file with the clerk, proof, by affidavit or other written evidence, of the delivery of the mandate to the accused; of the default, or other act, upon the occurrence of which, he was entitled to serve the notice; of the service of the notice; and of the failure to comply therewith. Thereupon the proceedings are the same, as where an order to show cause is made, and it, and a copy of the affidavits upon which it is granted, are served upon the accused.

§ 2271. Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in the last section but one, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court, at which a contested motion may be heard.

§ 2272. An order to show cause may be made, or a warrant may be issued, as prescribed in section two thousand two hundred and sixty-nine of this act, by referee appointed by the court, where the offense is committed upon the trial of an issue referred to him, or consists of a witness' non-attendance, or refusal to be sworn, or to testify, before him. The order or warrant may, in the discretion of the referee, be made returnable before him, or before the court. Where it is made returnable before the referee, he has all the power and authority of the court, with respect to the motion or special proceeding, instituted thereby.

It was held previous to the enactment of this section, in *Lathrop v. Clapp*, 40 N. Y. 328, that upon an examination under supplementary proceedings after judgment, where it appears that the judgment debtor has transferred property to a witness, that the latter was bound to answer all questions touching the transfer, and

upon his refusal to answer, he was liable to be punished for a contempt. The proceedings were under section 302 of the Code of Procedure, and the order to punish the witness for contempt might be made by a judge out of court, where the proceeding was pending before a referee, and need not state that the proceeding had impeded, impaired, prejudiced or defeated the plaintiff's remedy. In *Naylor v. Naylor*, 32 Hun, 228, it is held that the referee may make an order to show cause, returnable before the court, and that the court may then take cognizance of the matter, and has power to proceed in the premises.

§ 2273. An order to show cause may be made, either before or after the final judgment in the action, or the final order in the special proceeding. It is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein. A warrant of attachment is a mandate, whereby an original special proceeding is instituted against the accused, in behalf of the people, upon the relation of the complainant.

The order to show cause operates as a notice of motion made in the action, and the papers must be entitled in the action or proceeding. The warrant in the first instance institutes a new special proceeding, which may be entitled "*The People, ex rel. Theophelia G. Townsend, agst. Oliver B. Whitney.*" Where the order was made requiring the defendant to appear at a certain time and place specified, to show cause why he should not be *attached* for a contempt, on the return of which an order was made adjudging him guilty of a contempt, and directing his punishment therefor, and it did not appear that he was misled or failed to appear in consequence of the use of the term *attached* in place of *punished*, it was held that as the use of the term did not appear to have prejudiced the defendant, the order should be affirmed. *People v. Kenny*, 2 Hun, 346.

§ 2274. A copy of the warrant, and of the affidavit upon which it is issued, must be served upon the accused, when he is arrested by virtue thereof.

Copies of the affidavits upon which the papers are granted should be served. *Matter of Smethurst*, 2 Sandf. 724; *Ward v. Arenson*, 10 Bosw. 589. It is sufficient if a party charged with contempt has reasonable notice of an application to punish him, and was served with copies of the affidavits on which it was based. Papers once served and referred to in the order to show cause need not be again served. *Clark v. Bininger*, 43 N. Y. Super. 126; affirmed, 75 N. Y. 344.

Where a party has appeared in an action by attorney, it is not

necessary to serve him personally with an order to show cause why he should not be punished for contempt, such an order being commonly served on the attorney. *Matson v. Matson*, 5 Civ. Pro. 58. Where an order, that an administratrix show cause, was addressed to her individually, and not as administratrix, but the copy of the decree had been served and was referred to in the order, it was held the error might be amended. *Gillies v. Kreuder*, 1 Dem. 349. In a proceeding to punish for contempt, against agents of a city, it was objected that it did not appear that the summons and complaint in the original action had been served on the city, and the court allowed proof of such service to be made *nunc pro tunc*. The attachment was issued upon an affidavit also that the action was commenced by the service of a summons and complaint on the city. *Held*, that the original papers sufficiently showed that the city was a party to the action, and the order as to filing proof merely supplied additional proof of the fact. *People v. Dwyer*, 90 N. Y. 402. In proceedings to enforce the rights of a party who has recovered a judgment in a civil action, as for a contempt for refusing to comply with the judgment, personal service of the order to show cause is not indispensable, although it is in criminal contempts. The order may be served on the attorney. *Pitt v. Davison*, 37 N. Y. 235. Where attorneys appeared for the person adjudged guilty of contempt, after service on him of an attachment, he was held bound by their appearance and action. *Watrous v. Kearney*, 79 N. Y. 496.

§ 2275. Where a warrant of attachment is issued, the court, judge, or referee, may, in its or his discretion, by an indorsement thereupon, fix a sum, in which the accused may give an undertaking for his appearance to answer.

Where an indorsement is made on the undertaking, as provided by this section, the moving party obtains security for the appearance of the party complained of, in case the undertaking is furnished; otherwise he is committed, as if no such indorsement were made, as is provided in the next section. The form for indorsement is given under section 2269, *supra*.

§ 2276. If an indorsement is not made upon the warrant, as prescribed in the last section; or if such an indorsement is made and an undertaking is not given, as prescribed in the next section; the sheriff, after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge, or referee. Where, from sickness or any other cause, the accused is physically unable to attend before the court, judge, or referee, that fact is a sufficient excuse to the sheriff for not producing him, as required by the warrant. In that case, the sheriff must produce him, as directed by the court, judge, or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his

liberty, except as far as it is necessary so to do, in order to secure his personal attendance.

§ 2277. Where an indorsement is made upon the warrant, as prescribed in the last section but one, the accused must be discharged from arrest, upon his executing and delivering to the sheriff, at any time before the return day of the warrant, an undertaking to the people, in the sum specified in the indorsement, with two sufficient sureties, to the effect that he will appear, at the time when, and the place where, the warrant is returnable, and then and there abide the direction of the court, judge, or referee, as the case requires. The officer, taking the acknowledgment of the undertaking, must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offered as sureties, concerning their property and circumstances.

Precedent for Undertaking.

ULSTER SURROGATE'S COURT.

In the Matter of the Estate of John J. Ferris, deceased.

Title where proceeding is by order to show cause.

WHEREAS, On the 1st day of April, 1887, a warrant of attachment issued out of the Surrogate's Court, commanding the sheriff of Ulster county to arrest Oliver B. Whitney, and bring him before a Surrogate's Court, to be held at the surrogate's office in the city of Kingston, on the 10th day of April, 1887, at ten o'clock in the forenoon; and

WHEREAS, Said warrant of attachment has been executed by said sheriff;

Now, therefore, we, Nathaniel H. DuBois and William H. Woolsey, both of the town of Marbletown, farmers by occupation, hereby undertake, jointly and severally, in the sum of \$2,400, pursuant to the statute and order of the court, that the said Oliver B. Whitney will appear in the said Surrogate's Court, in the city of Kingston, in the county of Ulster, on the said 10th day of April, 1887, at ten o'clock in the forenoon, and then and there abide the direction and order of said Surrogate's Court.

NATHANIEL H. DuBOIS,
WILLIAM H. WOOLSEY.

(Add justification and acknowledgment.)

§ 2278. If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment cannot be issued. In that case, the court, upon proof of the facts, must issue a writ of *habeas corpus*, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting until the further order of the court.

The proceedings under writ of *habeas corpus* are treated under sections 2008 to 2066 inclusive, *supra*.

§ 2279. The sheriff or other officer must file the undertaking, if any, taken by him, with the return to the warrant or writ of *habeas corpus*.

The form of return may be, when indorsed on the warrant, as follows :

ULSTER COUNTY, *ss.* :

I, George Young, sheriff of Ulster county, certify that pursuant to the command of the within warrant, I have arrested the within-named Oliver B. Whitney, and taken an undertaking in the sum of \$2,400, as directed by said warrant, executed by Nathaniel H. DuBois and William H. Woolsey, conditioned that the said Oliver B. Whitney will appear at the time and place required in said warrant.

Dated *February 2*, 1887.

GEORGE YOUNG,

By GEORGE DUMOND, *Under Sheriff*.

§ 2280. When the accused is produced, by virtue of a warrant, or a writ of *habeas corpus*, or appears upon the return of a warrant, the court, judge, or referee, must, unless he admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answers thereto, under oath, within such reasonable time as the court, judge, or referee allows therefor; and either party may produce affidavits, or other proofs, contradicting or corroborating any answer. Upon the original affidavits, the answers, and subsequent proofs, the court, judge, or referee must determine whether the accused has committed the offense charged.

Precedent for Answer to Petition.

ULSTER SURROGATE'S COURT.

The People, <i>ex rel.</i> Theophelia G. Townsend, <i>agst.</i> Oliver B. Whitney.	}
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The answer of Oliver B. Whitney to the petition of Theophelia G. Townsend, filed in this court on the 1st day of April, 1887, shows to the court:

First. That the decree for non-compliance with which this attachment has issued was and is wholly merged in a judgment obtained against him, the said Oliver B. Whitney, for and by said Theophelia G. Townsend, on account of the sum directed to be paid her in and by the decree in the estate of said John J. Ferris, wherefore the petitioner should not be allowed to maintain this action.

Second. The said Oliver B. Whitney alleges that the said claim is actually owned by William G. Townsend, the husband of the petitioner, and that the petitioner is not the real party in interest, but that said William G. Townsend is the real party in interest.

Wherefore the said Oliver B. Whitney asks that said writ of attachment be vacated and set aside with costs.

(*Verification as to pleading.*)

OLIVER B. WHITNEY.

Interrogatories.—Interrogatories are only necessary in cases where the act or omission constituting the contempt is either denied

or not admitted, and when such act or omission is expressly admitted by defendant, it is not necessary that interrogatories should be filed. *People v. Cartwright*, 11 Hun, 362. Interrogatories are unnecessary when the contempt consists of the admitted refusal to answer questions, and the party has been served with the affidavits and order to show cause, and is before the judge and has full opportunity to answer. *Taylor v. Baldwin*, 14 Abb. 166; *Watson v. Fitzsimmons*, 5 Duer, 629; *People v. Campbell*, 40 N. Y. 133; *Pitt v. Davison*, 37 id. 235; *Lathrop v. Clapp*, 40 id. 328. Where the proceedings are instituted by an order to show cause, interrogatories are not necessary, even though the order does not show in what respect the injunction is claimed to have been violated, nor the punishment desired. *Mayor v. N. Y. & S. I. Ferry Co.*, 40 N. Y. Super. 300; affirmed, 64 N. Y. 622. And an order of reference may, in such a case, even in criminal contempts, send the matter to a referee without filing interrogatories. *People v. Alexander*, 3 Hun, 211. Where there was a motion for an attachment or other relief, and the matter was sent to a referee and it was heard on his report, interrogatories were held to be waived. *Matter of Nichols*, 54 N. Y. 62. Interrogatories should be confined to the fact of the service of the order or process, and to the acts or neglects constituting the violation. *Brown v. Andrews*, 1 Barb. 227. (See form under next section.)

Answer and hearing.—The fact that an order to show cause is irregular, where it does not mislead, is not ground for setting aside the order punishing for disobedience. *People v. Kenny*, 2 Hun, 346. If the order appears to be valid, the person served is bound to obey the order or move to set it aside; the only issues on the application to commit are as to the regularity of the proceedings and the excuse for disobedience. *Hilton v. Paterson*, 18 Abb. 245. After submitting to answer interrogatories, it is too late to raise the point that the judgment, which is the foundation of the proceedings, has not been served. *People v. Kearney*, 21 How. 74. Where, on an order to show cause, the judgment debtor fails to appear, and the county judge declares him in contempt, without further proof, it is irregular; the moving party must make out a case. *Tinkev v. Langdon*, 60 How. 180. If a party refuses to answer interrogatories, the order for commitment should specify such refusal as the misconduct; it is irregular to commit him for disobedience of the original order. *De Witt v. Denise*, 30 How. 131. There must be clear proof of the disobedience to authorize punishment. *Potter v. Low*, 16 How. 549. And the accused party may read, in addi-

tion to his answers to interrogatories, affidavits negating willful disobedience of the order for the violation of which it is sought to punish him. *People v. Murphy*, 1 Daly, 462. The moving party may read affidavits in reply. *Smith v. Smith*, 23 How. 134; affirmed, 14 Abb. 468. Where it is proper to impose any condition on vacating an attachment for contempt, this must be done in the first instance, and if an order vacating an attachment has once been entered, such order cannot be rescinded for the purpose of imposing a condition, nor can it be resettled or modified. *Matter of Bradner*, 87 N. Y. 171. It is no answer for an executor that the decree was made on joint petition of parties not entitled to join. *Estate of Kellinger*, 2 Civ. Pro. 68. The inability of the person disobeying may be considered. *Goodenough v. Davids*, 4 Law Bull. 35. In proceedings against the members of a common council for contempt, it is no defense that the assent of the mayor was wanting or that their disobedience was harmless, or that the act enjoined was a nullity. *People v. Dwyer*, 90 N. Y. 402.

§ 2281. If it is determined that the accused has committed the offense charged, and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court or before the judge or referee, the court, judge or referee must make a final order accordingly, and directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly.

In a commitment made by a court of general jurisdiction, all the preliminaries to warrant the imprisonment need not be set out, and it need not recite that evidence sufficient to justify the commitment has been given, although this is usual. *People v. Nevins*, 1 Hill, 154; *Davison's Case*, 13 Abb. 129; *People v. Oyer and Terminer*, 27 How. 14. But it must designate the particular misconduct of which the defendant is convicted. *De Witt v. Dennis*, 30 How. 131. And where a commitment of a witness for refusing to answer a question did not show the question was pertinent and legal, the prisoner was discharged on *habeas corpus*. *Matter of Quinn*, 2 Law Bull. 38. If the commitment is for non-payment of money, it must show refusal to pay, but if the ground is substantially stated and one in which the court had jurisdiction, the process will protect all engaged in the arrest. *Seaman v. Duryea*, 11 N. Y. 324. A commitment for refusing to deliver property must show on its face that the person committed had the custody of the property, and the court, on *habeas corpus*, may go back of the papers used on the motion to sustain or discharge a defective commitment. *People v.*

Connor, 15 Abb. (N. S.) 430. Where a prisoner was committed for contempt on several charges, one being for contemptuous behavior, no specific act being stated, it was held bad. *Matter of Clark*, 2 Law Bull. 22. But, on the other hand, in *People v. Kelly*, 12 Abb. 150; affirmed, 24 N. Y. 74, it was held that a commitment for refusing to testify, on the ground of alleged prejudice, need not show affirmatively the facts recited on establishing that he was not entitled to the privilege, even though it state that he claimed the privilege, nor how the question was relevant, nor how the answer might affect the prisoner; and it is held, in *Rugg v. Spencer*, 59 Barb. 383, that a recital of these matters, though a very proper and formal part of an adjudication or order, is not a vital and conclusive part. Nor is it at all conclusive as to the facts which were made to appear before the officer, or that no other facts appeared. It is said, in *Allen v. Allen*, 8 Abb. N. C. 175, that a commitment to jail for contempt for refusing to pay costs in divorce proceedings was held not to be invalidated by the fact that the commitment recited costs, for the non-payment of which there could be no imprisonment, the prisoner not having paid or offered to pay the residue. But in *People v. Bergen*, 6 Hun, 267, a commitment was set aside, among other reasons, upon the ground that it was too broad. In *Yates v. Lansing*, 9 Johns. 395, it was held that full recitals were not necessary, and, also, in *Reynolds v. McElhone*, 20 How. 454, informal recitals were held sufficient. As to sufficient and insufficient recitals, see *Ford v. Ford*, 41 How. 169; *Ward v. Ward*, 6 Abb. (N. S.) 79. It does not deprive a court of jurisdiction, or prevent a final decision on the merits, for a court to suspend final action for a period, to enable the party in contempt to comply with the original order, or to perform some act as a substitute for such compliance. *People v. Bergen*, 53 N. Y. 404. The costs should be taxed and inserted in the order as part of the fine imposed. *Albany City Bank v. Schermerhorn*, 9 Paige, 372. For direction as to form of order, see *People v. Rogers*, 2 id. 103.

Where a defendant is ordered committed for contempt, it must be to the jail without the limits. *People v. Fancher*, 2 Hun, 226. See *Amerman v. Stokes*, Fourth Dept., Oct., 1886, 3 State R. 356, holding that the enforcement of orders and decrees directing trustees to pay over money is by an execution against the person, or a precept of commitment which would entitle a party to the benefit of the jail liberties. Punishment for a contempt cannot be inflicted in cases where an execution can issue, viz., on a final decree for a sum of

and directing you to pay over to Theophelia G. Townsend the sum of \$800 due her as a legatee of John J. Ferris, deceased; if so, when and where?

Second interrogatory.—Did you then and there refuse to pay over said moneys, and have you not ever since neglected and refused so to do?

Third interrogatory.—Did you not, at the time of service of such decree, state you had spent the money of the estate, and that no court could compel you to pay it over?

All of which interrogatories the said Oliver B. Whitney is required to answer as aforesaid, pursuant to order of Surrogate's Court.

Granted April 12, 1887.

PRESTON & CHIPP,

Attorneys for Petitioner.

Answers to Interrogatories.

(Title as above.)

The answer of Oliver B. Whitney to the interrogatories this day propounded to him in this matter, pursuant to an order of this court:

First interrogatory.—To this he answers that a copy of the decree therein set forth was served upon him, but that at what date he is unable to say.

Second interrogatory.—To this he answers that he stated he was unable to pay the amount asked.

Third interrogatory.—To this he answers to the effect therein set forth, but that no disrespect to the court was thereby intended, but that he only intended to say it was impossible for him to raise the money required.

Subscribed and sworn to be-
fore me, April 10, 1887. }

OLIVER B. WHITNEY.

O. P. CARPENTER,

Surrogate.

Order Discharging Attachment.

At a Surrogate's Court, held in and for the county of Ulster, at the surrogate's office in the city of Kingston, said county, April 10, 1887:

Present—Hon. O. P. Carpenter, *Surrogate.*

The People, *ex rel.* Theophelia G. Townsend,

agst.

Oliver B. Whitney.

An application having been heretofore made by and on behalf of Theophelia G. Townsend as assignee under a certain decree made in this court, March 5, 1887, wherein and whereby Oliver B. Whitney and another, administrators of, etc., of John J. Ferris, deceased, were directed to pay certain sums of money to the assignors of said Theophelia G. Townsend, for a precept to arrest said administrators and bring them before this court, to answer for their alleged misconduct in refusing to pay said moneys, and such order having been granted, and an attachment issued thereon and been delivered to the sheriff, and the sheriff having brought the said Oliver B. Whitney before me by vir-

tue thereof, and the said Theophelia G. Townsend having appeared by Preston & Chipp, her attorneys, and said Oliver B. Whitney by J. J. Linson, his attorney, and evidence having been taken and a hearing had, and the said Theophelia G. Townsend having moved for a commitment against said Whitney: Now, due deliberation having been had thereon, it is ordered that the application for a commitment and execution against the person in the form prescribed by law be and the same hereby is denied, and the order granting an attachment against said Whitney vacated. And it is further ordered that the said application is denied as a matter of law and not as a matter of discretion.

O. P. CARPENTER,
Surrogate.

Order granting warrant may follow substantially same form.

Precedent for commitment adapted from 1 Duer, 511:

Warrant of Commitment.

The People of the State of New York to the Sheriff of the County of Ulster, greeting:

WHEREAS, On the 12th day of March, 1853, by an order made by the Superior Court, at a Special Term thereof, held at the City Hall in the city of New York, in a proceeding brought by the People, on the relation of Thomas E. Davis and Courtlandt Palmer, against Oscar W. Sturtevant, it was ordered that the said Oscar Sturtevant be committed to the common jail of said county, there to remain charged with the contempt mentioned in said order for the period of fifteen days, as therein set forth, and thereafter until he shall have fully paid the fine imposed upon him, amounting to the sum of \$352.20, and further directing a warrant to issue to carry such order into effect: Now, therefore, we command you that you take the body of the said Oscar Sturtevant, and safely keep him in your custody in the common jail of the city of New York, for the period of fifteen days, and thereafter until such time as he shall have fully paid the fine imposed by said order, being the sum of \$352.20, with your fees thereon, or until he shall be discharged by order of this court. And you are to make return of this writ to our said court, under your hand, and certify the manner in which you shall have executed the same.

Witness, Hon. John Duer, one of the justices of the Superior [L. S.] Court, at the City Hall, in the city of New York, this 12th day of March, 1853.

JOHN HARPER,
Attorney for Relator.

HENRY WILKINSON,
Clerk.

Indorsed; "By the court."

HENRY WILKINSON, *Clerk.*

A decree was granted against defendant in divorce by which he was required to give security for the maintenance of plaintiff, a copy of the decree was served on defendant, and a demand for security and payment of costs made, which was refused; a bailable attachment was issued, and on its return a motion was made to vacate it. The court denied the motion, fined the defendant for

misconduct, and ordered him to give the security. *Held*, that the court had jurisdiction to grant such relief as the facts and circumstances warranted; that it had authority to punish by fine or imprisonment, or either; and that it was sufficient to serve a copy of the decree, with a statement of the alimony unpaid, and a demand for the same; the fact that the decree authorizes an execution to issue in case of failure to pay the alimony does not estop plaintiff from enforcing its payment by proceedings for contempt. *Park v. Park*, 80 N. Y. 156. A reference having been made on a motion in an action for an injunction, and the order providing that the unsuccessful party should pay the referee's fees, the referee found the facts for defendant and caused a notice to be served on plaintiff stating that his report was ready, and the amount of his fees. Plaintiff not having paid the fees, the court, on proof, granted an order requiring plaintiff to pay within three days, or show cause why he should not be committed for disobeying the order, and on return of the order and proof of non-payment, an order directing the plaintiff to be committed for contempt, was granted. *Held* error, as there were no facts showing, or adjudication holding, that the alleged misconduct defeated, impaired, impeded, or prejudiced any right or remedy of the defendant. *Fischer v. Raab*, 81 N. Y. 235. Where the defendant in divorce proceedings was allowed to answer after default, upon terms that he should pay certain counsel and referee's fees, and he answered, but did not pay all the fees ordered, and an order was made adjudging him guilty of contempt for such failure to pay, it was held that the court had power to strike out defendant's answer for his refusal to obey its orders. *Clark v. Clark*, 1 State Rep. 287. The Surrogate's Court has power to impose a fine upon a witness committed for contempt in refusing to testify, not exceeding the amount of costs and expenses, and \$250 besides. Although actual loss or injury be not shown, error therein cannot be reviewed on *habeas corpus* and *certiorari*. *Matter of Jones*, 6 Civ. Pro. 250. In an action by a wife against her husband for an absolute divorce, the court has power to strike out defendant's answer for his failure to comply with an order requiring him to pay alimony and counsel fees, such power not having been taken away by sections 1773 and 2281, Code of Civil Procedure. *Brisbane v. Brisbane*, 5 Civ. Pro. 352.

The complaint of a party was stricken out as a punishment for a contempt for refusing to produce a paper in possession of his counsel in *Shelp v. Morrison*, 13 Hun, 110. Answer was stricken out.

Walker v. Walker, 82 N. Y. 260. See, also, *McCrea v. McCrea*, 58 How. 220. An order to punish one for a contempt in the non-payment of alimony must adjudge that the failure to pay had defeated, impaired or prejudiced the party applying therefor in his rights; if this is omitted the order is radically defective, and the punishment cannot be inflicted. *Mendel v. Mendel*, 4 State Rep. 556. The same principle is held as to invalidity of order in *Fall Brook Co. v. Hecksher*, id. 657. The application for a favor, by a party in contempt, will not be granted until he purges himself of the contempt. *Johnson v. Pinney*, 1 Paige, 646; *Ellingwood v. Stevenson*, 4 Sandf. Ch. 366; *Rogers v. Paterson*, 4 Paige, 450. Nor can the party in contempt apply to the court to take any aggressive steps, but he may appeal or move to set aside the order adjudging him in contempt; those are adjudging matters of right. *Matter of Steinert*, 24 Hun, 246; *Brinkley v. Brinkley*, 47 N. Y. 40. A resident of the State, who, in disobedience of a decree in divorce rendered against him on the ground of adultery, which prohibits him from marrying again during the life of the divorced wife, goes to another State and there contracts another marriage, immediately returning to this State to live, cannot, while in such contempt, be permitted to prosecute an action against his second wife for divorce on the ground of adultery. *Marshall v. Marshall*, 2 Hun, 238.

Review of the order.—As a general rule, the propriety of a commitment is not examinable by another court than the one by which it was awarded, but this is subject to the qualification that the conduct charged as constituting the contempt was such that some degree of delinquency or misbehavior can be predicated of it, for if the act is plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it does not become a contempt by being so adjudged. *Matter of Hackley*, 24 N. Y. 74. See *Mitchell's Case*, 12 Abb. 249. An order punishing for contempt in violation of an injunction can only be reviewed upon the merits, or for alleged legal error on appeal from the final order adjudging the contempt. *Watrous v. Kearney*, 79 N. Y. 496; reported below, 11 Hun, 584. Such a motion may be made when previous order was by default. *Tinkev v. Langdon*, 60 How. 180. Where an answer has been stricken out, the remedy is by application to the court to be let in. *Walker v. Walker*, 82 N. Y. 260. As to the right of appeal from a final order adjudging a party in contempt, see, also, *McCredie v. Senior*, 4 Paige, 378; *People v.*

Spaulding, 10 id. 284; 7 Hill, 302; *Forbes v. Willard*, 37 How. 193; *People v. Healey*, 48 Barb. 564; *People v. Sturtevant*, 9 N. Y. 263; *Livingston v. Swift*, 23 How. 1; *Brinkley v. Brinkley*, 47 N. Y. 40; *Sudlow v. Knox*, 7 Abb. (N. S.) 411; *Carrington v. Fonda Railway Co.*, 52 N. Y. 588. Since the present Code it is held, in *Matter of Dissosway*, 91 N. Y. 235, that an appeal was properly taken from a decision of a Surrogate's Court refusing to adjudge a party in contempt and affirming the decree appealed from. Where no fine was imposed on defendant by way of punishment, but wholly for the purpose of indemnity, the General Term could not reduce the fine to an amount which, under section 2284, could be imposed by way of punishment for defendant's misconduct, it having been imposed originally under this section. *Fall Brook Co. v. Leck-scher*, 4 State Rep. 657.

In *Snyder v. Van Ingen*, 9 Hun, 569, an appeal to the General Term was sustained where a party had been discharged from imprisonment for contempt on *habeas*, and he was again brought before the judge, retried and more severe penalties imposed. An appeal may be taken from the final order; it is not necessary that a commitment issue. *People v. Donohue*, 59 How. 417. The proper remedy to obtain relief by a party in contempt is by a motion in the court in which the order was granted; where a judge who made the order was no longer a member of the court, it was held the order was properly made before any judge sitting at Special Term. *Davidson's Case*, 13 Abb. 129; *People v. Murphy*, 1 Daly, 462. Where an attachment is regular on its face, with the recitals necessary to give jurisdiction, a party moving to set it aside for defects in the proceedings must show affirmatively the defect, or enough to throw the burden of proof on the other party. *Baker v. Stephens*, 10 Abb. (N. S.) 1. In a case where it is proper to impose any condition on vacating a warrant of attachment for contempt, this must be done in the first instance, and if an order vacating an attachment has once been entered, such order cannot be rescinded for the purpose of imposing a condition, nor can it be resettled or modified. The mode of review is provided by Code, sections 1356, 1357, this being a special proceeding. It is not necessary that an order should be final in order that an appeal may be taken from it. *Hart v. Johnson*, 7 State Rep. 133.

§ 2282. Where the accused is brought up by virtue of a writ of *habeas corpus*, he must, after the final order is made, be remanded to the custody of the sheriff or other officer to whom the writ was directed. If the final order directs that he be punished by imprisonment, or committed until the payment of a sum of money,

he must be so imprisoned or committed, upon his discharge from custody under the mandate by virtue of which he is held by the sheriff or other officer.

§ 2288. Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in the last section but one, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed without further process.

This section seems to contemplate the imprisonment of the party in contempt upon the order alone, a certified copy taking the place of the warrant. The precedent, therefore, given for warrant, committing to jail after adjudication, will only be necessary where the proceeding was commenced by attachment under section 2269, as there seems to be no provision for the imprisonment of the party adjudged in contempt, in such case, except by section 2281, requiring a commitment. The former practice required a commitment in any event, and the precedent given may be used even under section 2283, for greater caution.

§ 2284. If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages, for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

The court has no right to fine arbitrarily, or to take the opinion of the injured party as a standard, but the adjudication as to damages must be based on evidence. *Simmonds v. Simmonds*, 6 Week. Dig. 263. The amount of the fine is a matter of computation. *Sudlow v. Knox*, 7 Abb. 411. But where there has been actual injury, the court cannot impose a mere nominal fine. *Lansing v. Easton*, 7 Paige, 364. The amount of the fine to indemnify must be fixed upon proof of the damages sustained, according to the rules of law which would apply in an action for damages. *Sudlow v. Knox*, 4 Abb. Ct. App. Dec. 326. The question of damages may be heard before a referee as part of the contempt proceedings, and where the testimony showed that the party charged had, contrary to the prohibition of an injunction, collected and appropriated a certain sum of the assets of the moving party, it was held that *prima facie* the plaintiff was damnified to that extent by the transaction. *Har-*

teau v. Deer Park Blue Stone Co., 3 T. & C. 763. The party in contempt must be imprisoned till the fine is paid. *Lansing v. Easton*, 7 Paige, 364; *People v. Compton*, 1 Duer, 512; affirmed, 9 N. Y. 263. A fine in the amount of the costs and expenses is all that is proper, unless there is an adjudication that the act has produced loss. *People v. Oliver*, 66 Barb. 570. The degree of punishment to be inflicted is limited by this section to a fine sufficient to indemnify the aggrieved party for the actual loss or injury inflicted by the misconduct, and to sustain the imposition of a fine for loss or injury the fact of the existence of the loss must be proved by competent evidence. *Fall Brook Co. v. Hecksher*, 4 State Rep. 657. When there is an adjudication that the misconduct was calculated to, or did defeat the rights or remedies of the moving party, a fine is proper and is limited to \$250, unless actual loss or injury has been suffered, when the fine will cover such loss. In case of no pecuniary loss, only the necessary costs and expenses will be imposed. *People v. Compton*, 1 Duer, 512; *Clark v. Bininger*, 75 N. Y. 344; *Erie R. R. Co. v. Ramsey*, 45 id. 637. A party in contempt cannot be imprisoned until he performs some designated act, unless he was previously required to do so by the court, and omitted to perform it. *Simmonds v. Simmonds*, 4 Week. Dig. 130. Where the court, in punishing a violation of an injunction, ordered a party to pay certain damages as well as costs, and it did not clearly appear such damages had in fact resulted from the act complained of, the order was reversed. *Lyon v. Botchford*, 25 Hun, 57. The rule that actual indemnity to the party will be given, and upon evidence of the facts was held in *Dejonge v. Brenneman*, 23 Hun, 332; *King v. Flynn*, 37 id. 329. In supplementary proceedings the value of the property disposed of, and not the amount of the judgment, regulates the amount of the fine. *Reynolds v. Gilchrest*, 9 Hun, 203; *Ross v. Clusman*, 3 Sandf. 676; *Feely v. Glennen*, 2 Law Bull. 19. Where \$500 was allowed for loss and injury, on violation of an injunction, it was held on appeal to be not as costs, but under section 2284, for actual damages sustained by the misconduct of the defendant. *Brett v. Brett*, 33 Hun, 547. On proceedings to punish for contempt of *mandamus*, the fine is limited to costs and expenses of the contempt proceeding, where the contempt is not willful, and no pecuniary loss has been sustained. The costs in the *mandamus* case cannot be included. The court may include as a fair item of expense a compensation to the relator's attorney for his expenses in the proceedings. *People v. State Line R. R. Co.*, 14

Hun, 371; affirmed, 76 N. Y. 294. A counsel fee in excess of cost and expenses cannot be added (compare 33 Hun, 547, above) to the fine sufficient to indemnify the party, but it does not invalidate the order. The party may be held till he pays the legal items. *People v. Jacobs*, 66 N. Y. 8. The counsel fees are limited to the contempt proceedings. *Van Valkenburgh v. Doolittle*, 4 Abb. N. C. 72. Where the contempt consists of interfering with perishable property, the order should not absolutely require its return, but should liquidate its fair value to be repaid if a return is impossible. *Albany City Bank v. Schemerhorn*, 9 Paige, 372; reversed on another point, 10 id. 263.

A person interfering with property in the possession of a receiver under a mistake of law will be chargeable with the costs of the proceedings against him for contempt, though he may be excused from further punishment. *Noe v. Gibson*, 7 Paige, 513. Where the party accused acted in good faith, only motion fees and disbursements were charged against him. *People v. Cooper*, 20 Hun, 486. Where the sheriff refused to take the person charged before an officer to give bail, no fees were allowed him as against the party in his custody. *People v. Tefft*, 3 Cow. 340. Where a defendant in disobeying an injunction acted under the erroneous advice of his counsel, that it was suspended by an appeal taken, the fine should not exceed plaintiff's actual damages and costs, no counsel fees to be included. *Power v. Athens*, 19 Hun, 165. The power of the legislature to punish for a criminal contempt is fully discussed in *McDonald v. Keeler*, 99 N. Y. 463.

§ 2285. Where the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed. In such a case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment.

A person committed for contempt for non-payment of moneys, as ordered by the court, is not entitled to the jail liberties on giving the usual bond. *People v. Bennett*, 4 Paige, 103; *People v. Rogers*, 2 id. 103; *People v. Cowles*, 4 Keyes, 38; *Eagan v. Lynch*, 3 Civ. Pro. 236; *Clark v. Clark*, 2 Law Bull. 211; *Matter of Clark*, 20 Hun, 551; contra, *Ward v. Ward*, 6 Abb. (N. S.) 79; appeal dismissed, 81 N. Y. 638. The history of the power of Courts

of Chancery and Surrogates' Courts to punish as for contempt for failure to pay over moneys as directed by decree, is considered. *People v. Marshall*, 7 Abb. N. C. 380. The distinction between the commitment for contempt for non-payment of money and upon conviction for misconduct, is discussed and pointed out by Woodruff, J., in *People v. Cowles*, 4 Keyes, 38. And it is said that in the former case the process is strictly and purely remedial, and in the latter preventive, and in most instances wholly so.

§ 2286. Where an offender, imprisoned as prescribed in this title, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made as prescribed in section two thousand four hundred and fifty-seven of this act, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order directing him to be discharged from the imprisonment.

Where a judgment debtor, on being arrested on an attachment, at once submits himself to examination, the court will ordinarily accept his excuse and discharge him from arrest, but not where the debtor puts the creditor to expense, and raises all possible objections. *Hilton v. Patterson*, 18 Abb. 245. It was said in *Lansing v. Easton*, 7 Paige, 364, that there was no way in which a defendant imprisoned for a fine could be released, except by consent of the prosecutor, until payment of the fine. This was before the statute of 1843. The application to be discharged must be on notice to the adverse party. *Strobridge v. Strobridge*, 21 Hun, 288. Where the inability appears to be willful, the party will not be discharged. *Lansing v. Lansing*, 41 How. 248. Where, on an application to be discharged for inability to pay, the affidavit denied the contempt for which he was committed, it was held that as he denied a fact which had been adjudicated against him, he could not be believed as to the other statements, and the application was denied. *Palmer v. Kelly*, 4 Sandf. Ch. 575. An attorney who had been confined in jail upward of three months, for non-payment of a fine imposed for contempt, applied to be released because of inability to pay; under the circumstances, it appearing he had given bail for \$1,000 on his arrest, the order discharging him was reversed, unless he would give a bond for payment of the fine. *Matter of Steinert*, 29 Hun, 301. The expression "unable to endure the imprisonment" contemplates something in the nature of a slow wasting, a steady diminution of the vital forces, tending unless arrested by sunlight, open air, etc., to a complete destruction of the constitution; it does not apply to

malarial fever. *Moore v. McMahon*, 20 Hun, 44. In *Mitchell v. Hall*, 3 Law Bull. 23, it is questioned whether power to relieve the defendant is given solely to the court out of which the process issued, when commitment was made under section 2457 of the Code.

§ 2287. A person, punished as prescribed in this title, may, notwithstanding, be indicted for the same misconduct, if it is an indictable offense; but the court, before which he is convicted, must, in forming its sentence, take into consideration the previous punishment.

§ 2288. Where a person, arrested by virtue of a warrant of attachment, has given an undertaking for his appearance, as prescribed in this title, and fails to appear on the return day of the warrant, the court may either issue another warrant, or make an order, directing the undertaking to be prosecuted; or both.

Where a party has been arrested upon an attachment for a contempt, and has given a bond with sureties for his appearance at court, to abide the order of the court, and is adjudged to have been guilty of the misconduct alleged, and punishment by fine, and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. It is not the policy of the statute to give the aggrieved party two final and complete remedies for the same offense. *Barton v. Butts*, 32 How. 456. Where the defendant in such a proceeding has not appeared at all, and the bond has been prosecuted in pursuance of such an order, the court may still allow him to appear upon terms at a future term, and answer interrogatories to be filed touching the contempt. S. C., citing *People v. Munro*, 15 How. 494.

§ 2289. The order, directing the undertaking to be prosecuted, may, in the discretion of the court, direct the prosecution thereof, by and in the name of any party aggrieved by the misconduct of the accused. In such a case, the plaintiff may recover damages, to the extent of the loss or injury sustained by him, by reason of the misconduct, together with the costs and expenses of prosecuting the special proceeding in which the warrant was issued; not exceeding the sum specified in the undertaking.

Precedent for Order to Prosecute Bond.

At a Special Term of the Supreme Court, held at the court-house in the city of Albany, June 12, 1887:

Present — Hon. S. L. Mayhem, *Justice*.

The People, *ex rel.* John Cromwell,
agst.
Marinda Wheeler.

An undertaking having been heretofore made and filed by Henry Wilson and John Merchant, conditioned that Marinda Wheeler, the defendant herein, should this day appear at this term of this court,

on an attachment against her to answer for an alleged contempt in refusing to pay over to John Cromwell the sum of \$850 in her hands, applicable to the payment of a certain judgment against her, as directed by the court, and the said Marinda Wheeler having failed to appear, according to the terms of said undertaking: Now, on motion of E. D. Ronan, attorney for relator, it is ordered that said undertaking, given as aforesaid, be prosecuted by and in the name of the relator, John Cromwell, and for his benefit, pursuant to the provisions of the Code of Civil Procedure.

S. L. MAYHEM,
Justice Supreme Court.

§ 2290. If no party is aggrieved by the misconduct of the accused, the order must, and, in any case where the court thinks proper so to direct, it may, direct the prosecution of the undertaking, by the attorney-general, or by the district attorney of the county in which it was given, in the name of the people. In an action, brought pursuant to the order, the people are entitled to recover the entire sum, specified in the undertaking. Out of the money collected, the court, which directed the prosecution, must direct that the person, at whose instance the warrant was issued, be paid such a sum as it thinks proper, to satisfy the costs and expenses incurred by him, and to compensate him for any loss or injury sustained by him, by reason of the misconduct. The residue of the money must be paid into the treasury of the State.

§ 2291. After the return of an execution, issued upon a judgment rendered in an action upon the undertaking, an action to recover the amount of the judgment may be maintained against the sheriff, where it appears that, at the time when the undertaking was given, the sureties were insufficient, and the sheriff had reasonable grounds to doubt their sufficiency. Such an action may be maintained by the plaintiff, in whose favor the judgment was recovered. If the people were plaintiffs, the action must be prosecuted by the attorney-general or the district attorney; and any money collected therein must be disposed of, as prescribed in the last section.

§ 2292. Where a misconduct, which is punishable by fine or imprisonment, as prescribed in this title, occurs at a term of a Circuit Court, or with respect to a mandate returnable at a term of that court, or a special proceeding pending in that court, and was not punished at that term of the Circuit Court; the Supreme Court may inquire into and punish the misconduct, as if it had occurred at a Special Term of the Supreme Court, held in the same county, or with respect to a mandate returnable at such a Special Term, or a special proceeding pending in the Supreme Court.

CHAPTER XVI.

PROCEEDINGS TO COLLECT A FINE.

This proceeding is a revision of 2 Revised Statutes (2 Edm. 506), with changes relative to procedure. No cases are cited under any of the statutes, nor are any decisions reported throwing light on the procedure. The principal changes consist in imposing the duties on

the clerk of the court, which, under the statute, were required to be discharged by the district attorney.

§ 2298. Where a fine has been imposed by a court of record, upon a grand or trial juror, or upon any officer or other person, without being accompanied with an order for the immediate commitment of the person so fined, until the fine is paid; the clerk of the court, immediately after the close of the term at which the fine was imposed, must prepare a schedule, containing, in separate columns, the following matters:

1. The name of each person fined.
2. His place of residence, where it appears, from the papers on file or before the court, to be within the county.
3. The amount of the fine imposed upon him.
4. The cause for which the fine was imposed.

The clerk must subjoin to the schedule a certificate, to the effect that it contains a true abstract of the orders imposing fines, and must annex it to the warrant specified in the next section.

Schedule Under Section.

At a County Court and Court of Sessions, held at the court-house in Kingston, in and for the county of Ulster, on the 21st day of March, 1887:

Present—Hon. William S. Kenyon, *County Judge*.

In the Matter of Fines Imposed upon
certain Jurors.

At a term of this court, held as aforesaid, it appearing that the following-named jurors, duly summoned to attend thereat, failed to appear without excuse therefor, it is ordered that the persons named in the schedule below be fined the amount placed opposite their respective names and residences for such failure to attend:

NAME.	Residence.	Amount of Fine.	Cause of Fine.
Jacob C. Deyo	Woodstock.	\$25	Non-attendance as juror.
Henry R. Miller.	Shawangunk	25	Non-attendance as juror.
William C. Geldart	Marlboro	25	Non-attendance as juror.
John L. Brink	Saugerties	25	Non-attendance as juror.
Patrick Kearney	Kingston	25	Non-attendance as juror.

I, Jacob D. Wurts, clerk of the County Court and Court of Sessions, do, pursuant to the provisions of the Code of Civil Procedure, certify that the foregoing schedule contains a true statement of the fines imposed upon the above-named persons, at the above term, with their true places of residence and cause of said fine, and that the above order is a true abstract of the order imposing such fines.

Dated *March 19, 1887.*
[L. S.]

JACOB D. WURTS,
Clerk.

By provisions of section 1089, subdivision 4, the certificate of fines imposed in the city of New York must be returned by the clerk to the commissioner of jurors.

In the county of Kings, by the terms of section 1156, special provision is made as to collection of fines of jurors.

§ 2294. The clerk must immediately issue a warrant, under the seal of the court, directed to the sheriff of the county, and commanding him to collect from each of the persons, named in the schedule annexed to the warrant, the sum therein set opposite the person's name; and to pay over the sum collected, to the treasurer of the county. The warrant is the process of the court, by which the fines were imposed.

Precedent for Warrant.

To the Sheriff of the County of Ulster, greeting:

WHEREAS, At a County Court and Court of Sessions in and for the county of Ulster, held at the court-house in Kingston, on the 21st day of March, 1887, an order was duly made, imposing upon the persons named in the annexed schedule the fines opposite their names:

Now, therefore, you are commanded, in the name of the people of the State of New York, to collect from each of the persons named in the schedule attached to this warrant the sum set opposite that person's name, and to pay over the sum so collected to the county treasurer of the county of Ulster.

Witness, Hon. William S. Kenyon, county judge of Ulster [L. s.] county, at the court-house in Kingston, on the 21st day of March, 1887.

J. D. WURTS,
Clerk.

(Attach schedule.)

§ 2295. If a delinquent resides in another county, a separate warrant, for the collection of the fine imposed upon him, with an appropriate schedule annexed thereto, must be issued, in like manner, to the sheriff of the county where he resides.

§ 2296. The sheriff, to whom a warrant is issued, must collect each fine out of the personal property of the person fined, as prescribed in chapter thirteenth of this act, for the collection, by levy upon and sale of personal property, of an execution issued out of a court of record; and he is entitled to like fees thereupon. If sufficient personal property of a delinquent cannot be found to pay the fine and the fees, the sheriff must arrest the delinquent, and detain him in custody until he pays the same, as upon an execution against the person, issued in an action, out of the Supreme Court; and he is entitled to like fees thereupon.

§ 2297. The sheriff must return the warrant, with his proceedings thereupon, at the term of the court; or, where the fine was imposed, in any county except New York, by the Supreme Court, the Circuit Court, the Court of Oyer and Terminer, or the Court of Sessions, at the term of the County Court held next after the expiration of sixty days from the receipt thereof. If he fails so to do, the district attorney must take the same proceedings to compel a return, as may be taken by a judgment creditor, where a sheriff omits to return an execution, issued out of the Supreme Court.

Form of Return.

ULSTER COUNTY, ss.:

I, George Young, sheriff of Ulster county, do make and file my

return to the within warrant. I certify that pursuant to the command of said warrant I have collected, by levy and sale of personal property, the fines therein ordered to be collected from Jacob C. Deyo, Henry R. Miller and Patrick Kearney, and have paid the same, being the sum of \$75, to John Derrenbacher, county treasurer of Ulster county, and taken his receipt therefor.

That I have been unable to find sufficient personal property of William C. Geldart to satisfy the fine against him, or any part thereof, and I have arrested the said William C. Geldart, and now detain him in my custody as commanded by said warrant. I further certify that John L. Brink is not to be found in the county of Ulster, having removed therefrom to the State of Kansas, since the imposition of said fine.

GEORGE YOUNG, *Sheriff*.

By GEORGE DUMOND, *Under Sheriff*.

§ 2298. Where it appears, by the return, that a fine remains uncollected, and it does not appear that the sheriff has the delinquent in custody, the district attorney must, if he has good reason to believe that the sheriff might, with due diligence, have collected the fine, or arrested and detained the delinquent, commence an action against the sheriff, in the name of the people. Otherwise he must direct the clerk to issue a new warrant, or to include the fine in the schedule annexed to the next warrant, to be issued by him. A new warrant may, from time to time, be issued, or the fine may be included in the schedule annexed to a subsequent warrant, until it is collected.

§ 2299. Where the clerk issues a warrant, as prescribed in this title, he must include in the schedule thereto annexed, the name of each person who has been fined, prior to the issuing thereof, and whose fine remains then wholly or partly unpaid, and not remitted by the court.

§ 2300. An action may be maintained, in behalf of the people, against a sheriff, to whom a warrant is directed and delivered, as prescribed in this title, to recover damages for any omission of duty with respect to the same, in a case where a judgment creditor might maintain an action against a sheriff, to whom an execution issued out of the Supreme Court is directed and delivered. In such an action, the people are entitled to recover the same damages, which a judgment creditor would be entitled to recover, if the order imposing the fine was a judgment of the Supreme Court.

§ 2301. This title does not apply to a case, where special provision for the collection of a fine is otherwise made by law.

CHAPTER XVII.

PROCEEDINGS TO DISCOVER THE DEATH OF A TENANT FOR LIFE.

This is a substitute for the provisions of 2 R. S. 343 (2 Edm. 354), with section 2319 added.

§ 2302. A person entitled to claim real property, after the death of another who has a prior estate therein, may, not oftener than once in each calendar year, apply by petition to the Supreme Court, at a Special Term thereof, held within the judicial district, wherein the property, or a part thereof, is situated, for an order,

directing the production of the tenant for life, as prescribed in this title, by a person, named in the petition, against whom an action of ejectment to recover the real property can be maintained, if the tenant for life is dead; or, where there is no such person, by the guardian, husband, trustee, or other person, who has, or is entitled to, the custody of the person of the tenant for life, or the care of his estate.

§ 2303. The petition must be in writing, and verified by the affidavit of the petitioner, to the effect, that the matters of fact therein set forth are true. It must contain:

1. A description of the real property, and a statement of the petitioner's interest therein, and of such other facts as show that the case is within the provisions of the last section.
2. An averment that the petitioner believes that the person, upon whose life the prior estate depends, is dead, together with a statement of the grounds upon which the petitioner's belief is founded.

Petition for Production of Life Tenant.

SUPREME COURT, ULSTER COUNTY.

In the Matter of the Application of
Joseph H. Freer, to discover the
death of Alice W. Moon.

To the Supreme Court of the State of New York:

The petition of Joseph H. Freer, of the city of Albany, respectfully shows to the court that he is the owner in fee, and entitled to the possession, subject to the life estate of Alice W. Moon, of all that farm of land, lying and being in the town of Berne, in the county of Albany (insert description). That the same was demised to him by the last will and testament of Henry Freer, the father of your petitioner, and then husband of said Alice W. Moon, subject to the life estate of said Alice W. Moon, by will, probated on the 10th day of June, 1868.

That your petitioner is informed and believes that said Alice W. Moon is dead; that as your petitioner is informed and believes she left the county of Albany in 1881, for the State of Iowa, and there resided for a time with a daughter. That she has not been heard from for three years last past, having left the said State of Iowa about that time.

That as your petitioner verily believes, her death is concealed by John Moon, her son, who resided and now resides on the property hereinbefore described, and claims the right of possession under said life tenant.

Wherefore your petitioner prays that an order be granted directing the production of said Alice W. Moon, by the said John Moon, at a time and place to be therein named, and for such other or further relief as to the court may seem just.

JOSEPH H. FREER.

(Add verification as to pleading.)

§ 2304. A copy of the petition, including the affidavit, together with notice of the time and place at which the petition will be presented, must be personally

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served, at least fourteen days before its presentation, upon the person required, by the prayer thereof, to produce the tenant for life.

Form for Notice

(*Title as above.*)

Please take notice, that the petition of Joseph H. Freer, a copy of which is hereto annexed, will be presented to the Supreme Court, at a Special Term, to be held at the City Hall, in the city of Albany, on the 28th day of April, 1887, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and an application will be then and there made for the relief prayed for by said petition.

Dated April 10, 1887. Yours, etc.,

JAS. W. BENTLEY,

To JOHN MOON.

Attorney for Petitioner.

§ 2805. Upon the presentation of the petition and affidavit, with due proof, by affidavit, of service of a copy thereof and of the notice, if sufficient cause to the contrary is not shown by the adverse party, the court must either issue a commission, as prescribed in the following sections of this title, or make an order directing the adverse party, at a time and place therein specified, before the court, or a referee therein designated, to produce the person upon whose life the prior estate depends, or, in default thereof, to prove that he is living.

Precedent for Order.

At a Special Term of the Supreme Court, etc.

(*Title as above.*)

On reading and filing the verified petition of Joseph H. Freer, by which it appears that he is the owner in fee of certain premises therein described, and that the said premises are subject to the life estate of Alice W. Moon, whom he believes to be dead, and on due proof of service hereof, together with the notice of presentation to the court at this term, more than fourteen days since: Now, after hearing James W. Bentley, Esq., for the application, and E. D. Ronan, Esq., opposed, it is ordered that the said John Moon produce the said Alice W. Moon, before Charles J. Buchanan, Esq., who is hereby appointed referee for that purpose, at his office, in the city of Albany, on the 15th day of May, 1887, at ten o'clock in the forenoon, or in default thereof to prove that the said Alice W. Moon is living.

S. L. MAYHEM,

Justice Supreme Court.

§ 2806. Where an order, requiring the production of the tenant for life, or proof that he is living, is made as prescribed in the last section, a certified copy thereof must be served, at least fourteen days before the time therein specified, upon the person required to make the production or proof or upon his attorney. Upon presentation of proof of service, by affidavit, the court or referee must, at the time and place specified in the order, or at the time and place to which the hearing may be adjourned, hear the allegations and proofs of the parties respecting the identity of any person produced, with the person whose death is in question; or, if the latter person is not produced, respecting the reasons for the failure to produce him, and whether he is living. Where a referee is appointed he has the same powers, and is entitled to the same compensation, as a referee appointed for the trial of an issue in an action.

§ 2307. If it appears, by affidavit, to the satisfaction of the court, that the person required to be produced is imprisoned within the State, for any cause except upon a sentence for a felony, or is kept or detained, within the State, by any person, the court may, either before or after making the order for production, issue a writ of *habeas corpus* to bring him before it, or before the referee, as the case requires. The writ must be served and executed, and disobedience thereto may be punished as where a writ of *habeas corpus* is issued to inquire into the cause of the detention of a prisoner.

§ 2308. The referee must deliver his report to the petitioner, or file it with the clerk, within ten days after the case is closed. He must state therein whether any person was or was not produced before him, as being the person whose death is in question. He must append thereto, in the form of depositions, the proofs, if any, respecting the identity of any person so produced, with the person whose death is in question; or, if no one is so produced, upon the question whether the latter person is living. He must also state, in his report, his conclusions upon the questions controverted before him.

Precedent for Referee's Report.

(Title as above.)

To the Supreme Court of the State of New York:

The report of Charles J. Buchanan, sole referee appointed in this matter, shows to the court, pursuant to the order of this court heretofore made in this matter: I attended at my office at the time and place therein mentioned, and that James W. Bentley, Esq., appeared on behalf of petitioner, and E. D. Ronan, Esq., on behalf of John Moon. I further report that Alice W. Moon, the tenant for life of the property demised in the petition, also appeared before me at the same time and place, and her identity was admitted by petitioner's counsel. All of which is respectfully submitted.

Dated May 15, 1887.

CHARLES J. BUCHANAN,
Referee.

§ 2309. If it appears, to the satisfaction of the court, upon the referee's report and the proofs thereto appended; or, where a referee is not appointed, upon the allegations and proofs of the parties before the court, that the party, required to produce the tenant for life, or to prove his existence, has fully complied with the order, the court must make an order dismissing the petition, and requiring the petitioner to pay the costs of the proceedings.

The order dismissing the proceedings in case of report of compliance with former order, will be the usual Special Term order. The allowance of costs is regulated by section 2316.

§ 2310. If it appears, from the referee's report, or upon the hearing before the court, that the person, upon whose life the prior estate depends, was not produced; and if the party required to produce him, or to prove his existence, has not proved, to the satisfaction of the court, that he is living; a final order must be made, declaring that he is presumed to be dead, for the purpose of the proceedings, and directing that the petitioner be forthwith let into possession of the real property, as if that person was actually dead.

§ 2311. If, before or at the time of the presentation of the referee's report to the court, or where a referee is not appointed, at any time before the final order

is made, the party, upon whom the petition and notice are served, presents to the court presumptive proof, by affidavit, that the person, whose death is in question, is, or lately was at a place certain, without the State, the court must make an order, requiring the petitioner to take out a commission, directed to one or more persons, residing at or near that place, either designated in the order, or to be appointed upon a subsequent application for the commission, for the purpose of obtaining a view of the person, whose death is in question, and of taking such testimony, respecting his identity, as the parties produce. The order must also direct that the proceedings upon the petition be stayed, until the return of the commission; and that the petition be dismissed with costs, unless the petitioner takes out the commission, within a time specified in the order, and diligently procures it to be executed and returned, at his own expense.

§ 2312. It is not necessary, unless the court specially so directs, that the witnesses to be examined should be named in the commission, or that interrogatories should be annexed thereto. The commission must be executed and returned, and the deposition taken must be filed and used, as prescribed for those purposes in article second of title third of chapter ninth of this act, except as otherwise specially prescribed in this title.

§ 2313. The petitioner must give to the adverse party, or his attorney, written notice of the time when, and the place where, the commissioner or commissioners will attend, for the purpose of executing the commission, as follows:

1. If the place, where the commission is to be executed, is within the United States, or the dominion of Canada, he must give at least two months' notice.

2. If it is within either of the West India islands, he must give at least three months' notice.

3. In every other case, he must give at least four months' notice.

Notice may be given, as required by this section, by serving it as prescribed in this act for the service of a paper upon an attorney, in an action in the Supreme Court.

§ 2314. The commissioner or commissioners possess the same powers, and must proceed in the same manner, as a referee, appointed by an order requiring the production of the tenant for life, or proof of his existence; except that they cannot proceed, unless a person is produced before them, as being the person whose death is in question. The return to the commission must expressly state whether any person was or was not so produced. The testimony, respecting the identity of a person so produced, must be taken, unless otherwise specially directed by the court, as prescribed in chapter ninth of this act, for taking the deposition of a witness upon oral interrogatories; except that it is not necessary to give any other notice of the time and place of examination, than that prescribed in the last section.

§ 2315. Upon the return of the commission, the proceedings are the same as upon the report of a referee, as prescribed in sections two thousand three hundred and nine, and two thousand three hundred and ten of this act; but the court may, in its discretion, receive additional proofs from either party.

Order on Return of Commission.

At a Special Term of the Supreme Court, etc.

(*Title as in 2303.*)

On reading and filing the return to the commission heretofore issued to Arthur C. Osborn, of Des Moines, Iowa, directing him to obtain a

view of the person of Alice W. Moon, whose death is in question in this proceeding, and to take such proof as might be presented to him touching her identity, and having heard James W. Bentley, Esq., on behalf of the petitioner, and E. D. Ronan, Esq., opposed, and it appearing by said commission that said Alice W. Moon died on the 12th day of June, 1884, at the city of Des Moines, Iowa:

Now it is ordered that the said petitioner, Joseph H. Freer, be let into possession of the premises described in the petition, and John Moon is hereby ordered to so let the said Joseph H. Freer into possession thereof.

S. L. MAYHEM,

Justice Supreme Court.

§ 2316. Where costs of a special proceeding, taken as prescribed in this title, are awarded, they must be fixed by the court at a gross sum, not exceeding fifty dollars, in addition to disbursements. Where provision is not specially made in this title for the award of costs, they may be denied, or awarded to or against either party, as justice requires.

§ 2317. The possession of real property, which has been awarded to the petitioner, as prescribed in this title, upon the presumption of the death of the person, upon whose life the prior estate depends, must be restored by the order of the court, to the person evicted, or to his heirs or legal representatives, upon the petition of the latter, and proof to the satisfaction of the court, that the person presumed to be dead is living. The proceedings upon such an application are the same, as prescribed in this title, upon the application of the person to whom possession is awarded.

§ 2318. A person evicted, as prescribed in this title, may if the presumption, upon which he is evicted, is erroneous, maintain an action against the person who has occupied the property, or his executor or administrator, to recover the rents and profits of the property, during the occupation, while the person upon whose life the prior estate depends, is or was living.

§ 2319. A final order, made as prescribed in this title, awarding to the petitioner the possession of real property, is presumptive evidence only, in an action of ejectment, brought against him by the person evicted, or in an action brought as prescribed in the last section, of the life or death of the person upon whose life the prior estate depends.

CHAPTER XVIII.

PROCEEDINGS FOR THE APPOINTMENT OF A COMMITTEE OF THE PERSON AND OF THE PROPERTY OF A LUNATIC, IDIOT OR HABITUAL DRUNKARD. GENERAL POWERS AND DUTIES OF THE COMMITTEE.

The basis of this title is chapter 444, Laws of 1874, with additions by way of regulating the practice. Previous to the codification, the practice was uncertain, and must be sought for, as is said by the codifiers, in the adjudicated cases, and books of practice, and constituted a voluminous and intricate system. They further say that

they "have carefully endeavored to avoid inserting statutory restrictions upon the courts, tending to deprive them of any part of the large discretion now resting in them, which it is necessary to preserve for the benefit of the unfortunate individuals to whom this title applies." A change is made in the former procedure by authorizing a trial by jury at a trial term of the court instead of by a sheriff's jury.

§ 2320. The jurisdiction of the Supreme Court extends to the custody of the person, and the care of the property, of a person incompetent to manage himself or his affairs, in consequence of lunacy, idiocy, or habitual drunkenness. Where a superior city court, or a County Court, or both, have jurisdiction of those matters, concurrent with that of the Supreme Court, the jurisdiction of the court first exercising it, as prescribed in this title, is exclusive of that of the others, with respect to any matter within its jurisdiction for which provision is made in this title.

§ 2321. The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts, and for the safe-keeping and maintenance, and the education, when required, of the incompetent person and his family.

§ 2322. The jurisdiction, specified in the last two sections, must be exercised by means of a committee of the person, or a committee of the property, or of a particular portion of the property, of the incompetent person, appointed as prescribed in this title. The committee of the person and the committee of the property may be the same individual, or different individuals, in the discretion of the court.

The history of legislation in this State and a review of the rights of lunatics and habitual drunkards, respectively, is given in *Matter of Janes*, 30 How. 446, and *Matter of Brown*, 1 Abb. 108. In the latter case, the Superior Court of the city of New York refused to issue the commission of lunacy on the ground of want of jurisdiction. However, by subdivision 8 of section 263 of the Code, the power is now expressly defined. The same jurisdiction is conferred on County Courts by section 340, subdivision 4. See *Davis v. Spencer*, 24 N. Y. 386. The words "lunacy" and "lunatic" embrace every description of unsoundness of mind except idiocy. § 3343, Code, subd. 15. In *Stewart's Executor v. Lispenard*, Coke, 1 Inst. 246, quoted by Blackstone, 1 Comm. 343, is cited as to what constitutes lunacy, idiocy, and habitual drunkenness, to this effect: "*Non compos mentis* is the most legal term for all defects of the mind which the law notices. *Non compos mentis* is of four kinds:

"1. *Idiota*, which from his maturity by a perpetual infirmity is *non compos mentis*.

"2. He that by sickness, grief or other accident wholly loses his memory and understanding.

"3. A lunatic that hath sometimes his understanding and sometimes not.

"4. Lastly, he that for a time depresseth himself by his own vicious act of his memory and understanding, as he that is drunken."

The opinion of Verplanck is referred to as a very exhaustive statement of the various definitions of lunacy and idiocy. A person may from old age become so weak and incapacitated as to justify the appointment of a commission. *Matter of Barker* 2 Johns. Ch. 232. It is sufficient to justify a commission that a person is incapable of managing his own affairs, and this may arise from age, infirmity or other misfortune. *Jackson v. King*, 4 Cow. 207; *Matter of Mason*, 1 Barb. 437. The finding that the party is of unsound mind and mentally incapable of governing himself or his affairs is sufficient; the word "lunatic" is not requisite. *Ex parte Rogers*, 9 Abb. N. C. 141. A recommendation of the jury that the party, from long confinement and its consequences, may require some temporary guardianship, does not impair the legal effect of the finding. *Ex parte Dickie*, 7 Abb. N. C. 417. The finding, however, of the jury must be that the party is of unsound mind, as every case of weakness or imbecility will not justify a commission, but the mind must be so far impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. *Matter of Morgan*, 7 Paige, 236; *Matter of Mason*, 3 Edw. Ch. 380. It is, however, held in the late case, *Matter of Jackson*, 37 Hun, 306, citing earlier cases, and relying on *Delafield v. Parish*, 25 N. Y. 103; also citing *Riggs v. American Tract Society*, 84 id. 330, that a charge to the jury that to constitute a case of unsoundness of mind, which will justify the court in assuming the control of the person and property of the person by a committee, his mind must be so far impaired that if it had never been elevated above that state of capacity from his birth, it would have constituted a case of idiocy, was erroneous, as one may be wholly incompetent to manage himself and his affairs, and still be removed from a state of idiocy, and this is doubtless the present rule. See *Riggs v. American Tract Society*, 95 N. Y. 503.

Chancellor Walworth, in the *Matter of Tracy*, 1 Paige, 580, says with reference to what constitutes an habitual drunkard: "But very erroneous impressions seem to have gone abroad on this subject. It is supposed by many that the prosecutor in such cases is bound to

prove affirmatively, that an habitual drunkard is incapable of managing his affairs; on the contrary the fact that a person is for any considerable part of his time intoxicated to such a degree as to deprive him of his ordinary reasoning faculties is *prima facie* evidence at least that he is incapacitated to have the control and management of his property." A man of weak mind, if not a lunatic or a fool, can contract. *Odell v. Buck*, 21 Wend. 142. An epileptic of enfeebled mind was held competent to convey property. *Sprague v. Duel*, Clarke Ch. 90; affirmed, 11 Paige, 480. A person of weak mind is liable for necessaries. *Skidmore v. Romaine*, 2 Bradf. 122. A person born deaf and dumb is not necessarily an idiot. *Brower v. Fisher*, 4 Johns. Ch. 441. Ever since the Revised Statutes, the court has had control of both the person and estate of habitual drunkards. *Matter of Lynch*, 5 Paige, 120. The appointment of a special guardian for a party as a lunatic, upon an allegation of a petitioner in a proceeding for another purpose, is a mere matter of routine and not adjudication of lunacy. *Estate of Spencer*, 5 Redf. 425. In *Matter of Heeney*, 2 Barb. Ch. 326, it was held that the Court of Chancery had power to provide out of the surplus income of a lunatic for the support of persons not his next of kin, and whom the lunatic is under no legal obligations to support, where it satisfactorily appears to the chancellor, that the lunatic himself would have provided for the support of such persons had he been of sound mind. The committee of a lunatic may also be authorized to keep up the lunatic's family establishments as had been his custom previous to his lunacy, and to place at his disposal, so long as he is competent to judge of the claims of the applicants, small sums of money for the purposes of charity, as well as to expend a sum such as the lunatic was accustomed to do for the support of religious institutions. But the committee may not expend sums for charity or benevolent purposes other than had been the habit of the lunatic. The same rule is held in *Matter of Willoughby*, 11 Paige, 257, and that it is proper to allow provisions for the near relatives of the lunatic who are in need of such assistance, and a matter of course to make such provision for his children. The court in all these matters acts for the lunatic, in reference to the lunatic, as it supposes he would have acted if he had been of sound mind. The court has the same power over habitual drunkards as over a lunatic. *Ex parte Lynch*, 5 Paige, 120. The court has no power to appoint a committee of a lunatic or to order a sale of his property before a commission has been issued and returned. *Ex parte Payn*, 8 How.

220. The petition for a commission of lunacy against a non-resident must show that he is the owner of property within the State. *Ex parte Fowler*, 2 Barb. Ch. 305. Where a lunatic has wandered from home to some place unknown, a commission could issue from the Court of Chancery. *Ex parte Ganse*, 9 Paige, 416. In the case of *The Parsee Merchant*, 11 Abb. (N. S.) 209, Judge Daly holds that the court has the right and it is its duty to do whatever is most conducive to the interests of the lunatic, to see that he is maintained as comfortably as his circumstances will allow; and that every effort is made to restore him to his health. The interests of the lunatic are the controlling considerations and not those of the expectant successors to his estate.

§ 2323. An application for the appointment of such a committee must be made by petition, which may be presented by any person. Where the application is made to the Supreme Court, the petition must be presented at a Special Term, held within the judicial district where the person alleged to be incompetent resides; or, if he is not a resident of the State, or the place of his residence cannot be ascertained, where some of his property is situated.

§ 2324. Where the incompetent person has property, which may be endangered in consequence of his incompetency, and no relative or other person applies for the appointment of a committee of his property, the overseer or superintendent of the poor of the town, district, county, or city, in which he resides, or, where there is no such officer, the officer or officers, performing corresponding functions under another official title, must apply to the proper court, for the appointment of such a committee. The expenses of conducting the proceedings thereupon must be audited and allowed, in the same manner as other official expenses of those officers are audited and allowed.

§ 2325. The petition must be in writing, and verified by the affidavit of the petitioner, or his attorney, to the effect that the matters of fact therein stated are true. It must be accompanied with proof, by affidavit, that the case is one of those specified in this title. It must set forth the names and residences of the husband or wife, if any, and of the next of kin and heirs, of the person alleged to be incompetent, as far as the same are known to the petitioner, or can, with reasonable diligence, be ascertained by him. The court must, unless sufficient reasons for dispensing therewith are set forth, in the petition or accompanying affidavit, require notice of the presentation of the petition to be given to the husband or wife, if any, or to one or more of the relatives of the person alleged to be incompetent, or to any officer specified in the last section. Where notice is required, it may be given in any manner, which the court deems proper; and for that purpose, the hearing may be adjourned to a subsequent day, or to another term, at which the petition might have been presented.

The petition is usually presented by a relative or friend of the lunatic or drunkard, but section 2323 expressly provides that any person may make the application which was the practice in Chancery.

In proceedings instituted for the purpose of inquiring into the sanity of a citizen, the practice is to present to the court a veri-

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value

fied petition, accompanied by affidavits alleging the incompetency, by reason of unsoundness of mind to manage his affairs, of the person concerning whose sanity an investigation is sought, and praying the appointment of a committee of his person and estate, and a commission thereupon issues. *Matter of Church*, 64 How. 393. A statute providing for an adjudication by which a person shall be confined in an inebriate asylum as an habitual drunkard is unconstitutional. *Matter of Jones*, 30 How. 446. It is within the power of the Supreme Court to appoint a guardian for an idiot or lunatic defendant upon application for that purpose, even though no inquisition has been found. *Hunter v. Hatfield*, 12 Hun, 381. It is not necessary to accompany the petition with the affidavit of a physician, to give the court power to appoint a commission, although in cases of lunacy it is usual to do so. *Matter of Zimmer*, 15 Hun, 214. But a committee cannot be appointed on the certificates of physicians; there must be an inquisition. *Matter of Corlies*, 1 Law Bull. 59. The failure of the court to require notice of an application for the appointment of a committee for a lunatic to be given, where sufficient reasons for dispensing therewith are not set forth in the moving affidavit or the petition, does not deprive it of jurisdiction, but is a simple irregularity which may be cured or disregarded. It is sufficient, if, on a motion made by an alleged lunatic to set aside the order appointing the commission, all the parties interested have an opportunity to be heard. *Matter of Demelt*, 27 Hun, 480; *Matter of Rogers*, 9 Abb. N. O. 141. The alleged lunatic, except in case of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and he ought to be produced before the jury for their inspection and examination. *Ex parte Russell*, 1 Barb. Ch. 38; *Ex parte Tracy*, 1 Paige, 580. After the return of an inquisition finding sufficient facts, it is too late to question the allegations of the petition. *Ex parte Zimmer*, 15 Hun, 214.

Precedent for Affidavit and Petition.

(Affidavit.)

ULSTER COUNTY COURT.

In the Matter of Cornelia DuBois, a
Supposed Idiot.

ULSTER COUNTY, ss.:

Philip A. Ayers, Festus Stokes and Daniel Coddington, each of the town of Marbletown, said county, being each duly sworn, doth each

for himself depose and say, that he lives within a short distance of the house of Cornelia DuBois in said town, and has been acquainted with the said Cornelia since her childhood. That said Cornelia has always been of weak mind, and her mind appears to weaken as she advances in years. That she is now about thirty-two years of age, and is not capable of doing business or managing her affairs. That she cannot read or write, and is not capable of speaking intelligently or connectedly. That she has to be aided in dressing and undressing, and does not, unless aided, care for her person. That her condition is such that it affords no reasonable hope of her ever being any better.

Subscribed and sworn to before me, April 2, 1887. }

PHILIP A. AYERS,
DANIEL CODDINGTON,
FESTUS STOKES.

THOMAS SNYDER,
Justice of the Peace.

(*Petition.*)

ULSTER COUNTY COURT.

In the Matter of Cornelia DuBois, a
Supposed Idiot. }

To the County Court of Ulster County.

The petition of Hannah DuBois, of the town of Marbletown, said county, respectfully shows that your petitioner is the widow of John H. DuBois, who died intestate on or about the 24th day of October, 1886, and that your petitioner was duly appointed the administratrix of the estate of her said husband by the surrogate of the county of Ulster, on the 15th day of November, 1886. That Cornelia DuBois, the supposed idiot, is a sister of the deceased husband of this petitioner, and became of the age of thirty-two years on or about the 1st day of June, 1886. That since the death of the husband of this petitioner, the said Cornelia has lived and made her home with this petitioner. That prior to that time, and since about the year 1857, the said Cornelia has lived with and made her home in the family of the late husband of the petitioner. That said Cornelia has been and is a resident of the said town of Marbletown. That said Cornelia has been entirely unfit to have charge of, or manage her business affairs or property since her birth, and since about the year 1882, has been at times, and frequently, violent and dangerous to herself and those about her. That the said Cornelia DuBois is the owner of personal property, consisting of clothing of the value not to exceed the sum of about \$20. That the said Cornelia is the owner of certain real property of the value of about \$700, and which consists of the undivided one-third of the following property, being the farm in said town of Marbletown, lately belonging to Wessel L. DuBois, and purchased by him from Henry O. Lawrence, deed dated March 7, 1856, and recorded in the Ulster county clerk's office, in book of deeds No. 95, page 474, March 8, 1856, to which deed, or the record thereof, reference is hereby made for a full and particular description of said property; said property containing in all some ninety-four acres, ex-

cepting, however, from the above, about half an acre from the ten-acre lot mentioned in said deed sold to Lewis DuBois.

That this petitioner with her infant children, the heirs at law of her late husband, are the owners of the other undivided two-thirds of said property, and occupy the whole thereof. That the said children of this petitioner are named, aged, and reside as follows:

Hulda DuBois, nineteen years, residing at Marbletown, said county.

Rachel DuBois, seventeen years, residing at Marbletown, said county.

Sabina DuBois, twelve years, residing at Marbletown, said county.

That the said Cornelia DuBois is a single person, has never been married, her father and mother are both dead, and her only heirs at law and next of kin are as follows:

The children of this petitioner being the heirs at law and the children of John H. DuBois, deceased, a brother of said Cornelia, and whose ages and places of residence are given above. Lewis DuBois, a brother of full age, residing in said town of Marbletown.

That said Cornelia DuBois has never had any committee appointed of her person or estate.

Wherefore your petitioner prays that a committee of the person and property of said Cornelia DuBois be appointed, and that a commission may issue out and under the seal of this court to inquire of the apparent idiocy of the said Cornelia DuBois.

(Add verification as to pleading.)

HANNAH DUBOIS.

Precedent for Petition in Case of Habitual Drunkard

ULSTER COUNTY COURT.

In the Matter of David A. Abeel, a
supposed Habitual Drunkard.

To the County Court of Ulster County :

The petition of Mary E. Abeel, of Medina, Orleans county, New York, respectfully shows: That she is the general guardian and maternal aunt of the children of David A. Abeel; that her sister, the mother of said children, is dead, and said David A. Abeel has since remarried.

That the said David A. Abeel, who resides at the town of Saugerties, county of Ulster, now is, and for upwards of two years, as this petitioner learns from diligent inquiry and examination in the neighborhood where said David A. Abeel resides and has for several years resided, and from information obtained from relatives and friends of the family of said David A. Abeel, as well as from personal acquaintance and observation, an habitual drunkard, and by his habitual drunkenness is rendered incapable of managing his affairs, and in consequence thereof is wasting his property and liable to be defrauded thereof, if allowed to exercise control over it, all of which will more fully appear by the affidavits presented with the petition on this application. That the said David A. Abeel was bequeathed and devised, by his mother, lately deceased, personal and real property of considerable value.

That the personal estate to which he is entitled under the will of his said mother will be, as nearly as your petitioner can estimate,

about the sum of \$10,000, and the real estate so devised, in the opinion of your petitioner, nearly or quite the same value, and is situate in the said town of Saugerties, in the county of Ulster, and in the adjoining town of Catskill, in the county of Greene.

That Margaret A. Abeel is the wife of said David A. Abeel, and resides with him. That his family consists of Francis Groat Abeel, Nelson Edward Abeel, Harriet H. Abeel, all infants, of whom your petitioner is general guardian, his only heirs and next of kin.

Wherefore your petitioner prays that a committee of the property of the said David A. Abeel be appointed, and that a commission may issue out of and under the seal of this court, to inquire of the apparent habitual drunkenness of the said David A. Abeel.

Dated March 17, 1884.

(Signature.)

(Add verification as to pleading.)

Precedent for Affidavit.

In the Matter of David A. Abeel, a
supposed Habitual Drunkard.

ULSTER COUNTY, ss.:

Frederick A. Mower and Thomas N. Garrey, of the town of Saugerties, being each duly sworn, say, each for himself: That he is well acquainted with David A. Abeel and resides in the same neighborhood, and has known him for many years; that for a long period of time he has been in the habit of drinking to excess, and of going on sprees lasting for a considerable time, several days or weeks, absenting himself from home during the time, or a portion thereof, and spending money very freely; that within the past month, or thereabouts, he has, on two different occasions, indulged in prolonged sprees, frequenting hotels and taverns, and was, a short time since, as these deponents are informed and believe, ejected from a bar-room on account of intoxication; that while under the influence of liquor he is entirely incapable of caring for himself and liable to be imposed upon; that on one occasion shortly after his mother's death, one Martin Wheeler took for safe-keeping from said Abeel, the sum of \$100, which he afterward returned to him, said Abeel being unaware of what had become of the same; that he had at that time obtained some \$500 by sale or pledge of bank stock from his mother's estate; that by reason of such habitual drunkenness he is incapable of managing himself or his affairs, and is likely to waste his property and to be defrauded thereof by reason of his intoxication.

(Jurat.)

(Signatures.)

§ 2826. Where the person, alleged to be incompetent, resides without the State, and within the United States, and a committee or guardian of his property has been duly appointed, pursuant to the laws of the State or territory where he resides, the court may, in its discretion, make an order, appointing the foreign committee, or foreign guardian, the committee of all, or of a particular portion, of the property of the incompetent person, within the State, upon his giving such security for the discharge of his trust, as the court thinks proper.

The committee of a lunatic, appointed abroad, has no authority

over his property in this State. *Matter of Perkins*, 2 Johns. Oh. 124; *Matter of Petit*, 2 Paige, 174; *Matter of Ganse*, 9 id. 416; *Matter of Neally*, 26 How. 402; *Matter of Traznier*, 2 Redf. 171; *Weller v. Suggett*, 3 id. 249. In *Matter of Colah*, 6 Daly, 308, the court refused to turn over to the foreign committee of the lunatic who had become insane here and had been sent home, his estate here. The present section is new.

2-91 § 2327. Unless an order is made, as prescribed in the last section; if it presumptively appears, to the satisfaction of the court, from the petition and the proofs accompanying it, that the case is one of those specified in this title; and that a committee ought, in the exercise of a sound discretion, to be appointed; the court must make an order, directing, either

1. That a commission issue, as prescribed in the next section, to one or more fit persons, designated in the order; or

2. That the questions of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, be tried by a jury, at a trial term of the court; or, if the petition was presented to the Supreme Court, at a term of the Circuit Court for a county specified in the order.

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Precedent for Order for Commission.

At a special term of the, etc.

(*Title as above.*)

On reading and filing the petition of Mary Abeel, and the affidavits of Frederick Lasher and Thomas Garrey, all verified on the 1st day of May, 1884, and proof of service thereof on David E. Abeel, the supposed habitual drunkard, and on Mary Abeel, his wife, and the affidavits of David E. Abeel, Nelson Garrison and Maria Garrison, in opposition to the application for an order for a commission:

Now, after hearing E. B. Walker, Esq., attorney for the petitioner, and John W. Searing, Esq., on behalf of said David E. Abeel, opposed, it is ordered that a commission, in the nature of a writ *de lunatico inquirendo*, be issued out of and under the seal of this court, in the usual form, directed to S. T. Hull, Esq., counselor at law, Elbert H. Loughran, physician, and Amasa Humphrey, banker, all of the city of Kingston, in the county of Ulster, to inquire by a jury of said county whether the said David E. Abeel is an habitual drunkard, and incapable of managing his property, and that the sheriff of said county be instructed in said commission to summon a jury in the manner required by law.

It is further ordered that said commission be executed in the town of Saugerties, where the said David E. Abeel resides, and that previous notice of the time and place of such execution be given said David E. Abeel, to his wife, and to his counsel, John W. Searing, Esq., at least ten days before the date thereof.

It is further ordered that said David E. Abeel appear before said commission for examination before them.

SAMUEL EDWARDS,

Justice Supreme Court.

§ 2328. The commission must direct the commissioners to cause the sheriff of a

county, specified therein, to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions, with respect to the subjects of inquiry, or the manner of executing the commission, as the court directs to be inserted therein.

Precedent for Commission.

The People of the State of New York to Charles O. Sahler, of the county of Ulster, greeting:

Know ye that we have assigned to you to inquire, by the oath of good and lawful men of the county of Ulster, by whom the truth of the matter may be better known, whether Cornelia DuBois, of the town of Marbletown, in the county of Ulster, is an idiot, with or without lucid intervals, by reason of which infirmity she is incapable of governing herself or of managing her affairs or property, or properly caring for her lands, tenements, goods and chattels, and if so, from what time such infirmity dates, and in what manner and how such infirmity has manifested itself, and whether, while in such condition, the said Cornelia DuBois has alienated any lands and tenements, and if so to what person or persons, when, where, and after what manner; and also what lands, tenements, goods and chattels are yet remaining to her, and of what value the lands and tenements alienated by her are, as well as the value of the lands and tenements, goods and chattels by her maintained, and what the issues and profits thereof amount to by the year, and the value of all her real and personal estate, and who are the nearest heirs and next of kin of the said Cornelia DuBois, and who would be entitled to her estate in case of her death, and the age of each.

Wherefore we command you that you cause the sheriff of the county of Ulster to procure a jury, and that you inquire by the jury into the matters set forth in the petition in this proceeding, filed by Hannah DuBois, the 6th day of April, 1887, and also that you inquire into the value of the real estate and personal property of the said Cornelia DuBois, and the amount of her income therefrom, and the other matters above stated.

And that you appoint such day and place, or days and places, for the purpose of holding such inquisition as may be convenient; and that you give reasonable notice of the time and place of the execution of this commission, to said Cornelia DuBois, Hannah DuBois and Lewis DuBois, a brother of said Cornelia; and that you report the inquisition which you shall thereupon make under the hands and seals of yourselves, or a majority of you, together with those of the persons by whom it shall be made, distinctly and plainly, and without delay to our court, together with this writ.

Witness, Hon. William S. Kenyon, county judge of Ulster [L. s.] county, at his chambers in the city of Kingston, said county, this 18th day of April, 1887.

WILLIAM S. KENYON,
Ulster County Judge.

V. B. VAN WAGONEN,
Att'y for Petitioner, Kingston, N. Y.

JACOB D. WURTS,
Clerk of said Court.

§ 2329. Each commissioner, before entering upon the execution of his duties, must subscribe and take, before one of the officers specified in section eight hundred and forty-two of this act, and file with the clerk, an oath, faithfully, honestly and impartially to discharge the trust committed to him. If a commissioner becomes incompetent, or neglects or refuses to serve, or removes from the State, the court may remove him. The court may, from time to time, fill any vacancy created by death, removal or resignation.

Oath to Commissioners.

(Title.)

ULSTER COUNTY, ss.:

Samuel T. Hull, Elbert H. Loughran, and Amasa Humphrey, being each duly sworn, says each for himself, that he will faithfully, honestly, and impartially discharge the duty of commissioner in the above-entitled matter, under the order made herein by the Supreme Court.

(Jurat.)

(Signatures.)

Notice of Time and Place of Hearing.

To DAVID E. ABEEL, MARY ABEEL, his wife, and JOHN W. SEARING, Esq., his attorney:

Please take notice that a commission, heretofore issued, out of and by order of the Supreme Court, to inquire into the habitual drunkenness of David E. Abeel, will be executed at the hotel of Martin Manning, in the town of Saugerties, in the county of Ulster, at ten o'clock in the forenoon, of the 12th day of June next.

Dated May 10, 1887.

S. T. HULL,
E. H. LOUGHRAN,
AMASA HUMPHREY,
Committee.

§ 2330. The commissioners, or a majority of them, must immediately issue a precept to the sheriff, designated in the commission, requiring him to notify, not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the same court, to appear before the commissioners, at a specified time and place, within the county, to make inquiry, as commanded by the commission. The sheriff must notify the jurors accordingly; and must return the precept, and the names of the persons notified, to the commissioners, at the time and place specified in the precept. The commissioners, or a majority of them, must determine a challenge made to a juror. Upon the failure to attend, of a person who has been duly notified, his attendance may be compelled; and he may be punished by the court for a contempt, as where a juror, duly notified, fails to attend at a Circuit Court, or a trial term of the court. The commissioners may require the sheriff to cause a talesman to attend, in place of a juror notified, and not attending, or who is excused or discharged; or they may adjourn the proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance. But it is not necessary to cause any talesman to attend, if at least twelve of the persons, notified by the sheriff, appear and are sworn.

Notice to Sheriff to Summon Jurors.

To the Sheriff of the County of Ulster, greeting:

WHEREAS, A commission has issued out of the Supreme Court to

us, the undersigned, as commissioners, to inquire as to whether David E. Abeel, of the town of Saugerties, in the county of Ulster, is an habitual drunkard: Now, therefore, by virtue of such commission, bearing date the 1st day of May, 1884, we require you to notify not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the Supreme Court, to appear before us, at the hotel of Martin Manning, in the town of Saugerties, on the 12th day of June, 1884, at ten o'clock in the forenoon, then and there to inquire on their oaths, of the habitual drunkenness of the said David E. Abeel, and of all such matters and things as shall be given in charge, by virtue of said commission; thereof, fail not at your peril.

Given under our hands and seals this 1st day of June, 1887.

(Signatures of Commissioners.)

Indorsed by sheriff:—"The following-named jurors have been summoned to inquire into the matters set forth in the within precept, according to the tenor thereof."

The commissioners have no right to dictate to the sheriff what jurors shall be summoned. *Matter of Wager*, 6 Paige, 11.

§ 2331. All the commissioners must attend and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court, holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their disagreement to the commissioners, who must thereupon discharge them, and issue a new precept to the sheriff to procure another jury.

The jury should inspect the alleged lunatic when possible. *Matter of Russell*, 1 Barb. Ch. 38. The supposed lunatic may testify before the jury. *Matter of Dickie*, 7 Abb. N. C. 417. Counsel may sum up. Id. And a refusal to permit counsel for lunatic to sum up is error and vitiates the proceedings. *Matter of Church*, 64 How. 393. All the jurors who are sworn and commence should sit during the entire proceeding. *Tebout's Case*, 9 Abb. 211. A majority of the commissioners appointed must decide every question arising upon the examination of the commission. The sheriff should not be present at deliberations of jury. *Matter of Arnhout*, 1 Paige, 497. The inquiry must be confined to the time when the inquisition is taken, unless otherwise provided in the order, and a finding that the incapacity has existed for a given period of time is illegal and improper, and will be stricken out on appeal. *Matter of Demelt*, 27 Hun, 480.

Form of Oath to Jury.

You do solemnly swear well and truly to inquire touching the idiocy of Cornelia DuBois, and of all such matters and things as shall be

given to you in charge by virtue of a commission issued out of and under the seal of the County Court, and now here to be executed and a true inquisition make, according to the evidence. So help you God.

§ 2332. The inquisition must be signed by the jurors concurring therein, and by the commissioners, or a majority of them, and annexed to the commission. The commission and inquisition must be returned by the commissioners and filed with the clerk.

In *Matter of Mason*, 1 Barb. 436, it is held that the form of the return to the inquisition is only important so far as to satisfy the conscience of the court. If enough appears upon the inquisition to enable the court to adjudge the party to be within one of the classes of persons over whom the statute has given it jurisdiction, it is sufficient.

Inquisition.

An inquisition taken at the hotel of John B. Krom, in the village of High Falls, in the county of Ulster, on the 14th day of May, 1887, before Charles O. Sahler, sole commissioner, appointed by virtue of a commission in the nature of a writ *de lunatico inquirendo*, issued out of and under the seal of the court of Ulster county, and dated April 18, 1887, directed to the said commissioners, to inquire, among other things, of the idiocy of Cornelia DuBois, upon the oaths of Israel Snyder, John C. Sutton, Isaac Hasbrouck, Charles Hardenburgh, Simon R. Keator, William O. Church, Thomas Buckley, Richard S. Carney, Wessel B. Stokes, Thomas Snyder, Charles Rickert and Jacob L. Snyder, good and lawful men, who are indifferent persons qualified to serve and not exempt from serving as trial jurors in said County Court, who, being summoned, duly sworn and charged, upon their oaths say:

That the said Cornelia DuBois is an idiot, without lucid intervals, and by reason of such infirmity she is not capable of governing herself, or of managing her affairs or property, or properly taking care of her affairs, lands, tenements, goods and chattels, and that such infirmity dates from about the year 1860, and that infirmity manifests itself in weakness of mind, neglect of her person, and at times in violent conduct. That so far as brought to the knowledge of this commission and jury, the said Cornelia DuBois has not aliened any lands or property. That the value of the personal property of the said Cornelia DuBois, consisting of her personal clothing, does not exceed the sum of \$20.

That the real property of the said Cornelia consists of an undivided one-third of a certain farm in said town of Marbletown, belonging to Wessel L. DuBois, in his life-time, consisting of about ninety-two acres, which interest she inherited on the death of the said Wessel, and said interest is of the value of about \$650. That such interest in said real estate and personal property produces an income, and the rents, issues and profits thereof is of the annual value of \$30.

That the said Cornelia DuBois is unmarried, and her heirs at law and next of kin, and the persons who would be entitled to her estate in case of her death are named, related and aged as follows: (Here insert name of same, relationship, age, and interest in same.)

In testimony whereof, as well the said commissioner as the jurors aforesaid, have to this inquisition set their hands and seals the day and year first above written.

C. O. SAHLER, M. D.,
Sole Commissioner. [L. S.]

(All the jurors' signatures and their seals.)

§ 2333. The commissioners are entitled to such compensation for their services, as the court directs. The jurors are entitled to the same compensation, as jurors upon the trial of an issue in an action in the same court. The petitioner must pay the compensation of the commissioners, sheriff, and jurors.

§ 2334. Where an order is made, directing the trial, by a jury, at a trial term, or at a Circuit Court, of the questions of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, the order must state, distinctly and plainly, the questions of fact to be tried; which may be settled as where an order for a similar trial is made in an action. The court may, in that or in a subsequent order, direct that notice of the trial be given to such persons, and in such a manner, as it deems proper. The trial must be reviewed in the same manner, and with like effect, and, except as otherwise directed in the order, the proceedings thereupon are, in all respects, the same, as where questions of fact are tried, pursuant to an order for that purpose. The court may make inquiry, by means of a reference or otherwise, as it thinks proper, with respect to any matter, not involved in the questions tried by the jury, the determination of which is necessary in the course of the proceedings. The expenses of the trial, and of such an inquiry, must be paid by the petitioner.

Order where Trial is by Jury under Section 2327.

At a term of the Ulster County, etc.

In the Matter of Henrietta DuBois, a
Supposed Lunatic.

On reading and filing the petition of Henry Ayers, and affidavits of Martin Johnson and Henry Bogardus, a physician, showing that Henrietta DuBois is a lunatic and incompetent to manage her affairs, and due proof of service thereof having been made on said lunatic, and on her father; and after hearing D. W. Ostrander, Esq., for the application, and A. D. Lent, Esq., opposed, it is ordered that the question of fact arising upon the competency of said Henrietta DuBois be tried at a trial term of this court, pursuant to the provisions of section 2334 of the Code of Civil Procedure, and that the question of fact to be determined thereon is whether the said Henrietta DuBois, mentally, is capable of governing either herself or her affairs. It is further ordered, that the usual notice of trial be given in the usual manner to the said lunatic, to her father, Henry DuBois, and to her attorney, A. D. Lent, Esq.

WM. S. KENYON,
County Judge of Ulster County.

Questions of practice relating to regularity of proceedings upon execution of commission, cannot be reviewed collaterally. *Van-Deusen v. Sweet*, 51 N. Y. 378.

§ 2335. Where the petition alleges, that the person, with respect to whom it

prays for the appointment of a committee, is incompetent, by reason of lunacy, the inquiry with respect to his competency, upon the execution of a commission, or the trial at a Circuit Court or trial term, as prescribed in this title, must be confined to the question, whether he is so incompetent, at the time of the inquiry, and testimony, respecting any thing said or done by him, or his demeanor or state of mind, more than two years before the hearing or trial, shall not be received as proof of lunacy, unless the court otherwise specially directs, in the order granting the commission, or directing the trial by jury.

§ 2336. Upon the return of the commission, with the inquisition taken there under, or the rendering of the verdict of the jury, upon the questions submitted to it by the order for a trial by a jury, the court must either direct a new trial or hearing, or make such a final order upon the petition, as justice requires. Where a final order is made, dismissing a petition, the court may, in its discretion, award in the order a fixed sum, as costs, not exceeding fifty dollars and disbursements, to be paid by the petitioner to the adverse party. Where a committee of the property is appointed, the court must direct the payment by him, out of the funds in his hands, of the necessary disbursements of the petitioner, and of such a sum, for his costs and counsel fees, as it thinks reasonable; and it may, in its discretion, direct the committee to pay a sum, not exceeding fifty dollars and disbursements, to the attorney for any adverse party.

Confirmation.—In a very clear case of mistake or prejudice of a jury, the court may discharge the inquisition on the mere examination of the supposed lunatic, in connection with the evidence produced before the jury, but it is improper to do so on *ex parte* affidavits, contradicting the finding with no excuse for not having produced the deponents before the jury as witnesses. *Matter of Russell*, 1 Barb. Ch. 38. The finding and confirmation of an inquisition should not be set aside for mere irregularity where there is no room whatever for doubt of the lunacy. *Matter of Rogers*, 9 Abb. N. C. 141; *Matter of Lamoree*, 32 Barb. 122. Nor for insufficiency in the allegations of the petition. *Matter of Zimmer*, 15 Hun, 214. The defendant is entitled to a new hearing if it appears that the finding against him was induced by any bias or previously formed opinion. *Tebout's Case*, 9 Abb. 211.

The court has power in its discretion to direct a new commission where from the evidence or otherwise there is doubt that the jury erred in finding that the party was not of unsound mind. *Matter of Lasher*, 2 Barb. Ch. 97. An application to confirm or set aside an inquisition of lunacy is addressed very much to the discretion of the court and brings the case before it on the merits. *Matter of Rogers*, 9 Abb. N. C. 141. On petition to supersede the committee of a lunatic on the ground that the alleged lunatic is restored to his right mind, evidence tending to show that the inquisition was procured by fraud will not be received in the absence of such allegations in the petition. *Matter of Zimmer*, 15 Hun, 214. In *Matter*

of *Cooper*, 5 Law Bull. 38, a verdict was set aside as against weight of evidence and trial ordered at Circuit on issues framed. An application to set aside the proceedings of a sheriff's jury should be denied, even though section 2330 has not been complied with, if the commission and inquisition have been filed with the clerk pursuant to section 2332. *Matter of Gill*, Abbott's Annual, 1884, page 180.

Committee.—The custody of a lunatic's person and estate may be committed to the next of kin, instead of the heir; the presumption is in favor of kinder treatment from a daughter to a mother than from any other relatives. *Matter of Livingston*, 1 Johns. Ch. 436. The guardianship of a lunatic's estate is not as a matter of course to be committed to those presumptively entitled to it on his death, but they will be appointed where they appear to be the persons most likely to protect it. *Matter of Taylor*, 9 Paige, 611. If the next of kin unite in a petition and name the proper person or consent in writing, such person is usually selected. But if they do not so petition or consent there should be an order of reference and notice to the next of kin; it is irregular to appoint a stranger without notice. *Matter of Lamoree*, 19 How. 375; 32 Barb. 122. But on the other hand it is held that the appointment of a stranger as committee of a lunatic or idiot without notifying those who will succeed such idiot as heir is not irregular, and will not be set aside on their motion. *Matter of Owens*, 47 How. 150; *Pickersgill v. Reed*, 5 Hun, 170. It was said in *Matter of Paige*, 7 Daly, 155, limiting 5 id. 288, that there is no rule of law excluding the heirs and next of kin of a lunatic from appointment as committee of his person and property; though the court will exercise care and circumspection in appointing those who might be benefited by the lunatic's death, there is no absolute preference as a rule of law between them and strangers. The keeper of an asylum will not be appointed committee of a lunatic. *Matter of O'Connell*, 5 Law Bull. 60. Trust companies may be appointed committee of idiots, lunatics and habitual drunkards. Chap. 485, Laws of 1885.

Precedent for Petition for Appointment of Committee by Next of Kin.
SUPREME COURT—COLUMBIA COUNTY.

In the Matter of Henry G. Hoornbeck,
a Lunatic. }

To the Supreme Court of the State of New York:

The petition of Melissa Hoornbeck, Sarah Hoornbeck, William L. Hoornbeck and Martin Hoornbeck respectfully shows to the court

that heretofore, and on the 5th day of June, 1887, Henry G. Hoornbeck was declared a lunatic, and incapable of attending to his business and affairs by a commission appointed by this court on determination of a jury. That a committee is about to be appointed of the person and estate of said lunatic, and your petitioners are his only next of kin, being his sisters and brothers, his parents being dead, and he being unmarried. That your petitioners believe Amos Ward, of the city of Hudson, to be a proper person to be appointed such committee, both of the person and estate of said lunatic; and, therefore, pray the court, that upon the filing the security required by law and directed by this court, the said Amos Ward be appointed committee of the person and estate of said Henry G. Hoornbeck, with the usual powers incident thereto.

A. B. GARDENIER,

*Attorney for Petitioners,
Hudson, N. Y.*

MELISSA HOORNBECK,
SARAH HOORNBECK,
WILLIAM L. HOORNBECK,
MARTIN HOORNBECK.

(Add verification.)

Costs.—The granting or refusing of costs rests in the sound discretion of the court, and will not be granted against the estate of the lunatic, unless the proceedings were instituted for his benefit and prosecuted fairly and in good faith. *Matter of Beckwith*, 3 Hun, 443. In that case, where an attorney had taken proceedings to set aside a commission without consulting the lunatic or his family, he was charged with costs. The petitioner is not ordered to pay costs, as, of course, on failure, but will be excused if the petition was in good faith and on probable grounds. *Brower v. Fisher*, 4 Johns. Ch. 411; *Matter of McAdams*, 14 Hun, 492. And where one jury found the party of unsound mind, good faith is presumed. *Matter of Giles*, 11 Paige, 338. The committee in such case will be allowed legal and proper expenses, and counsel fees out of the estate. *Matter of Clapp*, 20 How. 385. A solicitor who unsuccessfully opposes a commission cannot claim costs against the estate, though the court may allow them in its discretion. *Matter of Conklin*, 8 Paige, 450. The allowance of costs to pay expenses of proceedings on appointment of a committee is in discretion of the court. *Matter of Folger*, 4 Johns. Ch. 170; *Matter of Tracy*, 1 Paige, 583; *Matter of Russell*, 1 Barb. Ch. 39. Where the issue is awarded for the benefit of a third party, for the purpose of sustaining a conveyance from the lunatic, he was ordered to pay costs. *Matter of Van Cott*, 1 Paige, 489; *Matter of Folger*, 4 Johns. Ch. 169. If the wife of a lunatic, without probable cause, applies for the removal of a committee, costs may be allowed to the committee and denied to her. *Matter of Lytle*, 8 Paige, 251. By rule 72 of 1883 the court may allow the commissioners a compensation not to

exceed \$10 for each day for each commissioner, and the court may direct the payment of costs and expenses up to \$250, exclusive of witnesses' fees, but in excess of that the order must be on notice to all parties who have appeared in the proceedings.

§ 2387. The provisions of article first of title seven, and section two thousand five hundred and ninety-five of article fifth of title second of chapter eighteenth of this act, respecting the security to be given by the guardian of the person or of the property of an infant, appointed by a Surrogate's Court, apply to a committee of the person or of the property, appointed as prescribed in this article. A committee of the property cannot enter upon the execution of his duties, until security is given as prescribed by the court. A committee of the person cannot enter upon the execution of his duties until security is given, if required by the court.

The bond given by the committee of a lunatic or habitual drunkard should be made payable to the people of the State, or to the register or clerk in whose office it is to be filed. *Matter of White*, 1 Barb. Ch. 43. *Matter of Connell*, 5 Law Bull. 60, raises the question whether the bond can be dispensed with. The Supreme Court may grant relief to the sureties of a committee, and require new security under chapter 654, Laws 1881, while by chapter 425, Laws 1885, a trust company may be appointed committee with or without giving security.

Bond of Committee.

Know all men by these presents, That we, Thomas Snyder, Philip A. Ayers and Jacob L. Snyder, of the town of Marbletown, in the county of Ulster, are held and firmly bound unto Cornelia DuBois, of the town of Marbletown, in the county of Ulster, an idiot, in the sum of \$800, lawful money of the United States, to be paid to said idiot, her executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals.

Dated 23d day of June, 1887.

The condition of this obligation is such that if the above-bounden Thomas Snyder shall and will, faithfully in all things, discharge the trust imposed in him, and obey all lawful directions of any court or officer of competent jurisdiction touching the trust, and that he will in all respects render a just and true account of all moneys and other property received by him, and of the application thereof, and of his guardianship whenever he is required so to do by a court of competent jurisdiction, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered }
in presence of }
JOHN BRODHEAD.
51

THOMAS SNYDER,
PHILIP A. AYERS,
JACOB L. SNYDER.

ULSTER COUNTY, ss.:

Philip A. Ayers and Jacob L. Snyder, the above-named sureties, being duly sworn, depose and say, and each for himself says, that he is a resident of Marbletown in this State, and is worth the sum of \$800 over and above all his just debts, liabilities and responsibilities.

Sworn to this 23d day } PHILIP A. AYERS,
of June, 1887. } JACOB L. SNYDER.

JOHN BRODHEAD,
Notary Public.

STATE OF NEW YORK, } ss.:
Ulster County, }

On this 23d day of June, 1887, before me personally came Thomas Snyder, Philip A. Ayers, and Jacob L. Snyder, to me known to be the same persons described in, and who executed the above bond, and severally acknowledged that they have executed the same.

JOHN BRODHEAD,
Notary Public.

§ 2338. A committee of the property is entitled to the same compensation as an executor or administrator. But in a special case, where his services exceed those of an executor or administrator, the Supreme Court or a superior city court may allow him such an additional compensation for such additional services as it deems just. The compensation of a committee of the person must be fixed by the court and paid by the committee of the property, if any, out of the funds in his hands.

It is said, in *Matter of Roberts*, 3 Johns. Ch. 43, that a committee of a lunatic is entitled to compensation for his services in receiving and paying out moneys, the same as a guardian or executor, and in *Matter of Livingston*, 9 Paige, 440, that besides actual expenditures and disbursements, the court cannot allow the committee for his personal services any other or greater compensation than that allowed to executors and administrators. But in the *Estate of Colah*, 6 Daly, 51, it was held that the committee was an officer of the court, and in the absence of legislation at that time the court had discretion as to compensation, and \$5,000 was allowed. This was, of course, previous to the enactment of the present section, which regulates the compensation in accordance with the earlier decisions. The power of the court to allow costs and expenses incurred by the committee continues up to the final report of the referee to settle his accounts; the reasonable charges of applications made to the court by the committee for instructions may be allowed as a necessary disbursement. *Matter of Clapp*, 20 How. 385. An allowance for services cannot be made to one who has acted as an attorney for the lunatic and the committee without notice to the committee. *Matter of Clowes*, 3 Law Bull. 21. The committee of an habitual drunkard who was guilty of gross negligence will be charged with

costs of proceedings for his removal and to procure a settlement of his accounts. *Matter of Carter*, 3 Paige, 146.

§ 2339. A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed or allowed to resign, in the discretion of the court. A vacancy created by death, removal or resignation, may be filled by the court. But a committee of the property cannot alien, mortgage, or otherwise dispose of real property, except to lease it for a term not exceeding five years, without the special direction of the court, obtained upon proceedings taken for that purpose, as prescribed in title seventh of this chapter.

In *Matter of Burr*, 17 Barb. 9, Mr. Justice Hand defines the duties of the committee as follows, citing many authorities: "The duties of the committee of the person are very delicate and important, being, says Mr. Shelford, to administer all the comfort and amusement the nature of the case will admit or the funds of the lunatic afford. He should be treated with great kindness, and all reasonable means of restoration should be employed, and, so far as necessary for this purpose, the expectations of the next of kin and all others disregarded; the great principle that pervades all orders in cases of lunacy is solely and exclusively his interest and comfort."

If any person is furnishing an habitual drunkard with the means of intoxication, the committee should apply to the court for an order restraining all persons from furnishing the drunkard with ardent spirits or means of obtaining it without the sanction of the committee, and a violation of the order, after notice, will be punished as a contempt. *Matter of Heller*, 3 Paige, 199; *Matter of Hoag*, 7 id. 312. Judgments by an innkeeper for ardent spirits sold under such circumstances were set aside. *L'Amoreaux v. Crosby*, 2 Paige, 402.

A bill may be filed for the enforcement of a debt of the lunatic against the committee alone. *Brasher v. Cortlandt*, 2 Johns. Ch. 400. The general practice is to unite the lunatic with the committee in a bill brought against him. *Ortley v. Messere*, 7 Johns. Ch. 139. It is a contempt to sue the lunatic after appointment of a committee. *Matter of Hopper*, 5 Paige, 489. As to joinder of the lunatic and committee, in an action as defendants, see *Teal v. Woodworth*, 3 Paige, 470; *New v. New*, 6 id. 237. The committee, under the direction of the court, has the entire control of the lunatic. Hoff. Ch. Pr. 262; cited 2 Cray's Pr. 29. The whole estate, both real and personal, of the lunatic, may be expended by the committee for his support. *Matter of McFarlan*, 2 Johns. Ch. 440. If the lunatic resides in another State and has property there, that, properly, should be first applied to his support. *Matter of Taylor*, 9 Paige, 611.

Where the estate of the lunatic is large, the committee may be allowed clerk hire out of the estate. *Matter of Livingston*, 9 Paige, 440; affirmed without opinion, 2 Denio, 575. The resignation of the committee will not be accepted merely because the duties have become unpleasant. *Matter of Lytle*, 3 Paige, 251. An order of reference will be made on such an application. *Matter of Miller*, 15 Abb. 277. An order removing the committee is discretionary and is not appealable to the General Term. *Matter of Guffer*, 5 Abb. (N. S.) 96. But under the decision in *Martin v. Windsor Hotel Co.*, 70 N. Y. 101, matters of substance, although discretionary, may be reviewed on appeal to General Term.

The committee of a lunatic estate who invested it in a mortgage on realty may release a part of the mortgage premises without applying to the court. *Pickersgill v. Reed*, 5 Hun, 170. The committee of an habitual drunkard ought not to make him a monthly allowance for spending money. *Stephens v. Marshall*, 23 Hun, 641.

Effect of inquisition.—After inquisition found, and the appointment of a committee of the estate of a lunatic, the court has jurisdiction to direct the application of the estate to the payment of the demands existing against it, and this relief may be granted on petition of a complainant, but where the estate is insufficient to pay all the debts in full, the assets, personal and real, must be distributed among the claimants ratably. Where the committee occupied leased premises, and carried on the business of the lunatic, the rent accruing will be regarded as a reasonable expense incurred by the committee, to be paid in preference to other creditors. *In re Otis*, 101 N. Y. 580. After an adjudication of lunacy has been made and confirmed, and a committee appointed and qualified, the committee occupies the same place and fills the same position as the lunatic in regard to his personal estate and property. He has the same right to deal therewith as the lunatic enjoyed before inquisition found, and is his representative in respect to all matters connected with the estate. *Viets v. Union Nat. Bank of Troy*, 101 N. Y. 569. The proper course, where there is a committee, is to petition the court, which may either allow a suit or direct a reference. *Matter of Hopper*, 5 Paige, 189; *Williams v. Cameron*, 26 Barb. 172; *Soverhill v. Dickinson*, 5 How. 109; *Matter of Wing*, 5 Hun, 170; *Sanford v. Sanford*, 62 N. Y. 553; *Robertson v. Lain*, 19 Wend. 649; *Clarke v. Dunham*, 4 Denio, 262; *Matter of Heller*, 3 Paige, 199; *Brasher v. Van Cortlandt*, 2 Johns. Ch. 242, 400.

Where the motion for leave to sue is heard on conflicting affidavits it

will be granted, where a case is shown, which, if proved, would entitle a party to relief in equity. *Matter of Wing*, 2 Hun, 671. The same rule, requiring leave to sue as to habitual drunkards, is held in *Brown v. Betts*, 13 Wend. 29; *L'Amoreaux v. Crosby*, 2 Paige, 422; *Niblo v. Hamson*, 9 Bosw. 668; *Hall v. Taylor*, 8 How. 428. Proceedings to foreclose a mortgage against an habitual drunkard cannot be taken without leave of the court. *Ex parte Parker*, 6 Alb. L. J. 324. Lunatic defendant can voluntarily appear, and the court will appoint guardian *ad litem* for him in partition. *Rogers v. McLean*, 34 N. Y. 536. The committee will, of course, be appointed special guardian where he has no adverse interest to the lunatic where both are sued. *New v. New*, 6 Paige, 237. A committee who has consented to have the rights of the parties litigated on a bill filed cannot afterward object that he had been proceeded against in that manner, without leave of the court by which he was appointed. *Outtriv v. Graves*, 1 Barb. Ch. 49. An attorney was authorized to appear for an idiot of full age on his retainer, in *Faulkner v. M'Clure*, 18 Johns. 134. As to when a judgment against a lunatic is not void. *Sternbergh v. Schoolcraft*, 2 Barb. 153; *Matter of Hopper*, 5 Paige, 489; *Person v. Warren*, 14 Barb. 438; *Loomis v. Spencer*, 2 Paige, 153; *Prentiss v. Cornell*, 31 Hun, 167; affirmed, 96 N. Y. 665. Judgment was set aside in *Demelt v. Leonard*, 19 How. 140. An habitual drunkard can have no lucid intervals; the inquisition is in the nature of a proceeding *in rem*, and persons subsequently dealing with him are deemed to have notice of his incapacity. *Wadsworth v. Sharpsteen*, 8 N. Y. 388. All acts done after inquisition found are absolutely void. *L'Amoreaux v. Crosby*, 2 Paige, 422. But the finding of an inquisition against an habitual drunkard is only *prima facie* evidence of the invalidity of an act done before the commission issued, but which is overreached by the finding. *Van Deusen v. Sweet*, 51 N. Y. 378; *Van Wyck v. Brasher*, 81 id. 260. In the latter case it is said that an habitual drunkard is not incompetent to execute a deed; he simply is incompetent upon proof that at the time his understanding was clouded, or his reason dethroned by actual intoxication, or upon proof of general unsoundness of mind. *Peck v. Cary*, 27 N. Y. 9; *Gardner v. Gardner*, 22 Wend. 526. This holding relates to an act before inquisition found, and does not necessarily conflict with *Wadsworth v. Sharpsteen*, 8 N. Y. 388, *supra*. It is held in *Lewis v. Jones*, 50 Barb. 645, that an habitual drunkard, while subject to a committee,

is only *prima facie* incompetent to make a will, and the like rule is held as to a deed. *Van Deusen v. Sweet*, 51 N. Y. 378; *Rider v. Miller*, 86 id. 507; *Hirsch v. Tramor*, 3 Abb. N. C. 274; *Searles v. Harvey*, 6 Hun, 658. So also as to a note. *Hicks v. Marshall*, 8 id. 327. And in case of marriage. *Banker v. Banker*, 63 N. Y. 409. It is said a person against whom an inquisition in lunacy has been issued, but who is not concededly incapable of managing his own affairs, cannot be deprived of the control of his property, or the right to take legal proceedings to obtain satisfaction of a valid demand before an adverse decision by a jury. *Estate of Halsey*, 16 Week. Dig. 437. A proceeding *de lunatico* has no effect on a contract made without notice, and on the faith that the person contracted with was of competent understanding. *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541.

Where a lunatic continued to reside with his family after inquisition, and parties ignorant of the commission furnished him groceries, the bill was ordered paid by the committee. *Matter of Wing*, 2 Hun, 671. See *Ex parte Cunningham*, id. 114. The committee of a lunatic, by taking possession of property leased by a lunatic, and continuing it for the use of the estate, makes himself liable in the same manner as an executor or trustee. *Matter of Otis*, 34 Hun, 542. For further references as to contracts, of lunatics actions against lunatics, and management of estates of lunatics, see Brightly's Dig., vol. 2, page 2571, and vol. 3, page 5378, title "*Lunacy*."

§ 2340. A committee of the property, appointed as prescribed in this title, may maintain, in his own name, adding his official title, any action or special proceeding, which the person, with respect to whom he is appointed, might have maintained, if the appointment had not been made.

A committee may sue in his own name to cancel the sale of a farm to a lunatic, and to procure satisfaction of a mortgage executed by him. *Fields v. Fowler*, 2 Hun, 400. Although it was held before the enactment of this section that the committee was not the trustee of an express trust, and not authorized to bring an action as to real estate. *Burnet v. Bookstaver*, 10 Hun, 481; *McKillip v. McKillip*, 8 Barb. 552. But a contrary rule is held in *Person v. Warren*, 14 id. 488. Committee cannot ratify a contract of a lunatic, made by him after office found, so as to maintain an action upon it. *Fitzhugh v. Wilcox*, 12 Barb. 235. The committee of a lunatic may maintain an action to set aside a purchase of real property, pending a commission against the vendor as an habitual drunkard. It is contempt of court. *Griswold v. Miller*, 15 Barb. 520. The defendant sought to reverse a judgment on the ground that

the plaintiff was insane at the time of the commencement of the action, and was incompetent to employ an attorney, and, therefore, the attorney was without authority to appear for him. The plaintiff had not been judicially declared to be a lunatic, but was confined in an asylum and pronounced by the physicians there to be incurably insane. *Held*, that the right to commence an action in the name of a person of unsound mind, before he is declared to be such, is implied by this section. That a lunatic has a legal standing to appear as a party until a committee has been appointed as provided by law. *Rumberg v. Johnson*, 5 State Rep. 860.

§ 2341. The provisions of article second of title seventh of chapter eighteenth of this act, requiring the general guardian of an infant's property, appointed by a Surrogate's Court, to file, in the month of January of each year, an inventory, account, and affidavit, and prescribing the form of the papers so to be filed, apply to a committee of the property, appointed as prescribed in this title. For the purpose of making that application, the committee is deemed a general guardian of the property; the person, with respect to whom he is appointed, is deemed a ward; and the papers must be filed in the office of the clerk of the court, by which the committee was appointed; or, if he was appointed by the Supreme Court, in the clerk's office where the order appointing him is entered.

§ 2342. In the month of February of each year, the presiding judge of the court, by which the committee of the property was appointed; or, if he was appointed by the Supreme Court, the county judge of the county where the order appointing him is entered; must examine, or cause to be examined under his direction, all accounts and inventories filed by committees of the property, since the first day of February of the preceding year. If it appears, upon the examination, that a committee, appointed as prescribed in this title, has omitted to file his annual inventory or account, or the affidavit relating thereto, as prescribed in the last section; or if the judge is of opinion that the interest of the person, with respect to whom the committee was appointed, requires that he should render a more full or satisfactory inventory or account; the judge must make an order, requiring the committee to supply the deficiency, and also, in his discretion, personally to pay the expense of serving the order upon him. An order so made may be entered and enforced, and the failure to obey it may be punished, as if it was made by the court. Where the committee fails to comply with the order, within three months after it is made; or, where the judge has reason to believe, that sufficient cause exists for the removal of the committee, the judge may, in his discretion, appoint a fit person special guardian of the incompetent person, with respect to whom the committee was appointed, for the purpose of filing a petition in his behalf, for the removal of the committee, and prosecuting the necessary proceedings for that purpose. The committee may be compelled, in the discretion of the court, to pay personally the costs of the proceedings so instituted.

If the committee neglects to file an inventory or to render his accounts regularly, under oath, in the settlement of his accounts, every intendment will be taken most strongly against him. *Matter of Carter*, 3 Paige, 146; *Matter of Seaman*, 2 id. 409.

When the committee of a drunkard fail to file the inventories required by law, and do not, at the commencement of the proceedings, disclose all the property they have received, they may properly be charged with one-half of the expenses of the accounting. The committee should not be credited with amounts allowed by them to the inebriate as spending money, subject to abuse by him, nor for an expenditure which it does not clearly appear that the inebriate, if in possession of his faculties, would probably have made himself. The committee should forfeit their commissions on moneys charged to them because its expenditure was improper and subversive of the purposes of their appointment, but such mismanagement furnishes no justification for a refusal to correct a clerical error in their accounts, whereby they have charged, instead of crediting themselves, with a sum of money. *Matter of Stephens*, 13 Week. Dig. 567; 23 Hun, 641. Leave will not be granted to discontinue proceedings to compel a committee of a deceased lunatic to account upon the application of the administrator in order to enable the latter to begin an action for the same purpose in another court. *Matter of Butler*, 8 Civ. Pro. 56.

Inventory and Account of Committee.

ULSTER COUNTY COURT.

In the Matter of the Accounting of
John W. Searing, Committee of David
A. Abeel, an Habitual Drunkard.

Inventory.

A just and true inventory of the property of David A. Abeel, an habitual drunkard, on the 1st day of April, 1886, made pursuant to law, by John W. Searing, committee of said habitual drunkard.

The assets of said habitual drunkard in my charge and under my control consist of:

A farm lying in the town of Saugerties, consisting of one hundred and fifty acres, valued at.....	\$10,000
Stock thereon, valued at (give details of items).....	1,600
Twenty shares of bank stock in First National Bank of Saugerties, worth at par value.....	2,000
Balance of legacy left to David A. Abeel.....	2,500
Farm produce (itemized).....	780
Bond and mortgage on real estate in town of Ghent, Columbia county.....	1,700
A dwelling-house in Saugerties	1,000
Total assets	\$19,580

COMMITTEE OF THE PERSON AND OF THE PROPERTY. 409

I have made no investments during the year. I have received the following sums:

From sales of farm produce.....	\$750
From interest on bond and mortgage.....	102
From rent on house.....	60
From interest on loan.....	150
From rent of farm.....	1,000
From all other sources.....	300

\$2,352

I have paid out for support and maintenance of said David A.

Abeel and his family, and taxes and insurance.....	1,500
--	-------

In my hands.....	\$852
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April 4, 1886.

ULSTER COUNTY, ss.:

John W. Searing, the committee of the person and property of the above-named David A. Abeel, an habitual drunkard, being duly sworn, doth depose and say, that the foregoing inventory and account contain, to the best of deponents' knowledge and belief, a full and true statement of all his receipts and disbursements on account of said David A. Abeel, and all money and other personal property of the said David A. Abeel which have come into deponent's hands, or have been received by any other person by his order or authority, or for his use since his appointment, and of the value of all such property, together with a full and true account of the manner in which he has disposed of the same, and of all the property remaining in his hands at the time of the filing of said inventory and account; and a full and true description of the amount and nature of each investment made by him since his appointment, and that he does not know of any error or omission in the said inventory or account to the prejudice of the said David A. Abeel.

(*Add jurat.*)

(*Signature.*)

§ 2343. Where a person, with respect to whom a committee is appointed as prescribed in this title, becomes competent to manage himself or his affairs, the court must make an order, discharging the committee of his property, or the committee of his person, or both, as the case requires; and requiring the former committee to restore to him the property, remaining in the committee's hands. Thereupon the property must be restored accordingly.

The court will not restore the estate and discharge the committee of an habitual drunkard, except upon proof of a permanent restoration; there should be a year's voluntary and total reformation. *Matter of Hoag*, 7 Paige, 312. A petition by a lunatic to supersede a commission may be referred, or he may be examined by the court. *Matter of Hanks*, 3 Johns. Ch. 567. Where, after a committee has been appointed, the mind of the lunatic has been restored in part, the court may discharge the proceedings against him par-

tially, so far as to enable him to make a will under judicial supervision, with leave to revoke it wholly without such sanction, retaining, however, control of his property so far as is necessary to protect it. *Matter of Burr*, 2 Barb. Ch. 208. Where committees both of the person and estate have been appointed, the former will not be discharged on the petition of the lunatic, alleging that he is so far restored to reason as to be able to govern himself, if it does not appear that he is yet competent to manage his estate, if no application is made to discharge the committee of his estate.

Precedent for Order Discharging Committee.

At a term of the County Court held at the court-house in the city of Kingston, Ulster county, N. Y., June 23, 1886:

Present — Hon. William S. Kenyon, *County Judge of Ulster County.*

In the Matter of David A. Abeel, an
Habitual Drunkard. }

On reading and filing the petition of David A. Abeel, above named, dated June 20, 1886, setting forth that he has been habitually temperate in the use of ardent spirits for twelve months past, and praying for the discharge of his committee, John W. Searing, heretofore appointed in the above matter, and for the restoration of his property, and on reading and filing the affidavits of John Crow and Hiram Connors, dated respectively May 15, 1886, and May 23, 1886, in support of said petition, and upon examining the said David A. Abeel, in open court, as to his habits, etc.:

It is hereby ordered on motion of Charles Davis, counsel for said David A. Abeel, that the said committee, John W. Searing, heretofore appointed herein of the person and estate of said David A. Abeel, be and he is hereby discharged, and that he restore to said David A. Abeel the property remaining in his hands of the said David A. Abeel, after deducting the legal charges and expenses of the said committee.

WILLIAM S. KENYON,
County Judge of Ulster County.

§ 2844. Where a person, of whose property a committee has been appointed, as prescribed in this title, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of, as if a committee had not been appointed.

Upon the death of a lunatic, the powers and duties of his committee cease; any legal claims against the estate can thereafter only be enforced in the manner furnished by law. *Matter of Beckwith*, 87 N. Y. 503.

CHAPTER XIX.

PROCEEDINGS FOR THE DISPOSITION OF THE REAL PROPERTY OF AN INFANT, LUNATIC, IDIOT, OR HABITUAL DRUNKARD.

The matters treated under the above-entitled provisions of the Code consist of numerous provisions scattered through the statutes relative to infants, lunatics and habitual drunkards, and to the disposition of their real estate when either held in trust for others or contracted to be sold by an ancestor, as well as proceedings for the purpose of sale for the immediate benefit of the persons interested.

The codifiers say in their note upon this title when first presented to the Legislature that they have consolidated these various enactments so as to provide, so far as practicable, uniform rules and a uniform mode of proceeding for the disposition of the real property of those different classes of persons who are under an incapacity to dispose of their property without the aid of the court. In a very few instances the difference in the character, and particularly in the duration of the incapacity of an infant, and that of a lunatic, etc., or in the mode by which the guardian of the former and the committee of the latter are appointed, has required the retention of a special provision applicable exclusively to one class of cases.

§ 2345. In either of the following cases, an action may be maintained against an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, to procure a judgment directing a conveyance of real property, or of an interest in real property:

1. Where the infant or incompetent person is seized or possessed of the real property, or interest in real property, by way of mortgage, or only in trust for another.

2. Where a valid contract for the sale or conveyance of the real property, or interest in real property, has been made; but a conveyance thereof cannot be made, by reason of the infancy or incompetency of the person in whom the title is vested.

Where a contract was made for the sale of lands by a party who died before its performance, leaving an only child as his heir at law, who was a lunatic, it was held that a court of equity might decree a specific performance of the contract, and direct the committee of the lunatic to execute all necessary conveyances for the purpose. *Swartout v. Burr*, 1 Barb. 495. Heirs of a vendor are bound to fulfill his contracts to convey to the extent of the estate that descends to them, and an infant heir is bound to convey, and the statute expressly gave power to compel a conveyance, and its authority was full and express. *Hill v. Ressegieu*, 17 Barb. 162. Specific per-

formance will be compelled between an infant and the surviving party to a contract for sale of lands in cases where it would have been decreed between the original parties, unless there are some intervening equities controlling the case. Willard's Eq. 269; cited 1 Crary, 462. The court may decree a specific performance by the infant of the contract of his ancestor where the infant is a resident of this State, although the lands contracted to be conveyed are in another State. *Sutphen v. Fowler*, 9 Paige, 280. Where the order of the court directs the infants merely to convey their interest in property for the purpose of fulfilling the contract of the ancestor, personal covenants inserted in a deed executed on their behalf are void. Whether, if the ancestor contracts to convey with covenants as to title, the court has power, under an application under the statute for specific performance, to require the heir to convey by deed containing covenants, *quere*. Neither infants or guardians appointed for that purpose can convey land except pursuant to the order of the court, and a deed executed without such order or beyond its terms is void. *Hyatt v. Seeley*, 1 Kern. 52. The chancellor refused to grant an order that the infants convey with covenants, in *Matter of Ellison*, 5 Johns. Ch. 261, but protected the purchaser by requiring the money to be invested until the infant became of age, that he might be indemnified if the title should fail.

§ 2346. [Amended, 1882.] An action may be maintained, in a case specified in the last section, by a person entitled to the conveyance; and also in a case specified in subdivision second of that section, by the executor or administrator of the person who made the contract, or of a person who died seized or possessed of the real property, or interest in real property, or by an heir or devisee of either of those persons, to whom the real property has descended, or was devised. The action may be maintained by the committee of the lunatic or other incompetent person; but in that case the court must appoint a special guardian for the incompetent person, as required by law, where an infant is defendant, and the proceedings are the same as in a like action against an infant.

§ 2347. A judgment, directing such a conveyance, shall not be rendered, unless the court, after hearing the parties, is satisfied that the conveyance ought to be made. Upon rendering final judgment to that effect, the court has power to direct the guardian of the infant's property, or the committee of the property of the lunatic or other incompetent person, or a special guardian appointed in the action, to execute any conveyance, or to do any other act, which is necessary in order to carry the judgment into effect.

The guardian should execute the deed by subscribing the name of the infant by him, adding his own name as guardian; if only subscribed by the guardian as such, it is defective. *Hyatt v. Seeley*, 1 Kern. 52.

§ 2348. In either of the following cases, real property, or a term, estate, or

other interest in real property, belonging to an infant, or to a person incompetent to manage his affairs, by reason of lunacy, idiocy or habitual drunkenness, may be sold, conveyed, mortgaged, or leased, as prescribed in the following sections of this title:

1. Where the personal property, and the income of the real property of the infant or incompetent person are, together, insufficient for the payment of his debts, or for the maintenance and necessary education of himself and his family.

2. Where the interests of the infant or incompetent person require, or will be substantially promoted by, such disposition, on account of the real property, or term, estate, or other interest in real property, being exposed to waste or dilapidation; or being wholly unproductive; or for other peculiar reasons, or on account of other peculiar circumstances.

3. Where an action might be maintained, against the infant or incompetent person, to procure a judgment, directing a conveyance of the real property, or interest in real property, as prescribed in sections two thousand three hundred and forty-five and two thousand three hundred and forty-six of this act.

The court has no right to order the sale of the real estate of an idiot, lunatic, or habitual drunkard, independent of the provisions of the statute, even for the payment of debts, and with the consent of the heir at law and next of kin. *Matter of Pettit*, 2 Paige, 596.

The same rule is applicable to sales of real estate of infants. *Baker v. Lorillard*, 4 N. Y. 257; *Horton v. McCoy*, 47 id. 21; *Rogers v. Dill*, 6 Hill, 416; *Matter of Turner*, 10 Barb. 552; *Onderdonk v. Mott*, 34 id. 106. It has in a later case been said that a court of equity has jurisdiction independent of the statutory provisions. *Wood v. Mather*, 38 Barb. 473; affirmed, 44 N. Y. 249. A private statute authorizing such sale was held valid in *Cochran v. Van Surley*, 20 Wend. 365; *Brevoort v. Grace*, 53 N. Y. 245. Prior to the statute of 1864, the court would not direct the sale of real estate of a lunatic, idiot or habitual drunkard, so long as there was personal estate applicable to the purpose. *Matter of Kellet*, 3 Paige, 199; *Matter of Hoag*, 7 id. 312. The same rule is now embodied in subdivision 1 of this section. Before the estate of a lunatic can be sold the court must acquire jurisdiction of the person and estate of the lunatic by issuing a commission and the return thereon. *Matter of Paige*, 8 How. 220. Such jurisdiction must be acquired in proceedings in this State. *Matter of Perkins*, 2 Johns. Ch. 4; *Matter of Neally*, 26 How. 402. The jurisdiction given to the court in case of a lunatic can only be exercised in the manner the statute directs; it being a special proceeding, an omission of a substantial requirement renders proceeding invalid. *Matter of Valentine*, 72 N. Y. 184. In proceedings to sell real estate of infants, the rule applies that in proceedings in derogation of common law by which the title of one is to be divested and trans-

ferred to another, every requisite of the statute having the semblance of benefit to the infant must be complied with, or the title will not pass. *Battell v. Torrey*, 65 N. Y. 294. It was held in *Brasher v. Van Courtlandt*, 2 Johns. Ch. 400; S. C., id. 242, that the real estate of a lunatic might be sold for the payment of his debts upon an action by a creditor for that purpose without a petition by the committee, but the sale must be conducted under the direction of the court in substantially the same manner as if sold on such petition. The sale of the real estate of infants under the statute was intended for the better education and maintenance of the infants, and for their special and substantial benefit. *Matter of Whitaker*, 4 Johns. Ch. 378. It was held, *Matter of Mason*, 1 Hopk. Ch. 122, that whenever it appeared satisfactorily to the court that the situation of the infants as regards maintenance and education would be improved, the order would be made as in case of property exposed to waste and dilapidation, or an unproductive village lot. It is good ground for sale that expense of a suit in partition may be avoided thereby. *Matter of Corydon*, 2 Paige, 566. But the fact that a sale would increase the income of an adult tenant in common is not sufficient ground. *Matter of Jones*, 2 Barb. Ch. 22. A sale contrary to the provisions of a devise is void. *Matter of Turner*, 10 Barb. 553; *Rogers v. Dill*, 6 Hill, 415. In order to authorize a sale, the infants must have title to the property; a vested remainder may be sold. *Baker v. Lorillard*, 4 N. Y. 257. But the future estate of an infant in lands will not be ordered to be sold except under very special circumstances. *Matter of Jones*, 2 Barb. Ch. 22. The term "real estate" includes every freehold estate and interest in lands, and where there is a vested remainder in fee there is a seizin in law within the statute, and the court has jurisdiction to order a sale. *Jenkins v. Fahey*, 73 N. Y. 355; *Matter of Haight*, 14 Hun, 176. The contingent interest of an infant under a devise conditioned upon the remarriage of the mother, to whom the primary estate is devised, is not an estate which can be sold under the statute. *Matter of Dodge*, 40 Hun, 443. The court cannot order or direct the guardian of an infant to consent to the abandonment of a strip of land left after the apportionment of the remainder for the purposes of a street, and the execution of a release or quit-claim therefor, without compliance with the provisions of the statute; and a quit-claim executed without such compliance will convey no title. *Battell v. Burrill*, 10 Abb. (N. S.) 97; affirmed, 50 N. Y. 13. The provisions of section 2355, since enacted, how-

ever, authorize the final order to contain such directions respecting the time, manner and conditions of a sale or conveyance directed thereby, as the court thinks proper to insert therein.

§ 2349. An application, in either of the cases prescribed in the last section, must be made by the petition of the general guardian, or the guardian of the property of the infant; or by the committee of the property of the lunatic or other incompetent person; or by any relative, or other person, in behalf of either. Where the application is in behalf of an infant of the age of fourteen years or upwards, the infant must join therein. Where the application is made to the Supreme Court, the petition must be presented at a term held within the judicial district, in which the property, or a part thereof, is situated.

The mother, the uncle, and the general guardian have been held proper parties to present the petition. *Matter of Lansing*, 3 Paige, 265; *Matter of Whitlock*, 32 Barb. 48; *O'Reilly v. King*, 28 How. 408. It is said in the last case that the fact that the petitioner is a creditor of the infant does not disqualify him from making the application. It will be noted that *Cole v. Goulay*, 79 N. Y. 527, was decided previous to the Code, and that there was at that time no statutory provision requiring an infant over fourteen to join in the petition, as is now provided for in this section. The application is *ex parte*, and should be made to the court at Special Term. *Matter of Bookhout*, 31 Barb. 348. The County Court is open, however, at all times for such applications, section 355, Code Civil Procedure. See *Brown v. Snell*, 57 N. Y. 286.

§ 2350. The petition must be verified, in like manner as a verified pleading in an action in the Supreme Court. It must set forth the grounds of the application; and, in a case specified in subdivision first or second of the last section but one, it must also state the particulars and value of the real and personal property, and the amount of the income, of the infant or incompetent person; the disposition which has been made of his personal property; and an account of the debts or demands, if any, existing against his estate.

The provisions of Rule 55, relating to sale of real estate of infants, etc, are as follows:

Rule 55. The petition in proceedings to sell, mortgage or lease real estate belonging to an infant or lunatic, idiot or habitual drunkard, shall state, besides the particular grounds for sale, mortgage or lease of the property, and the other matters required by the Code, the age and residence of the person proposed as a special guardian or committee, the relationship, if any, which he bears to the infant, lunatic, idiot or habitual drunkard, and the security proposed to be given; and also, whether any previous application has been made, and if so, the time thereof, and what disposition was made of the same.

§ 2351. An application to sell, mortgage, or lease real property, or an interest in real property, of a lunatic, idiot, or habitual drunkard, cannot be granted, unless a committee of his property has been appointed. Upon such an application, if it is made by the committee, the court must make an order, directing him

to file with the clerk a bond, in such a form, in such an amount, and with such sureties as it directs, conditioned for the faithful discharge of his trust; for the paying over and investing of, and accounting for, all money received by him in the special proceeding, according to the direction of any court having authority to give directions in the premises; and for the observance of the directions of the court, in relation to the trust. If the application is made by any other person, an order must be made thereupon, requiring the committee to show cause why he should not file such a bond. If, after hearing the committee, the court is of opinion that there is probable cause for granting the application, it may make an order requiring the committee to file such a bond; or, if the committee so elects, or fails to file the bond as directed in the order, it may appoint a suitable person to be the special guardian of the incompetent person, with respect to the proceedings; who must thereupon file such a bond.

§ 2352. Upon an application to sell, mortgage, or lease real property, or an interest in real property, of an infant, the court must appoint a suitable person to be the special guardian of the infant, with respect to the proceedings; who must thereupon file with the clerk a bond, as prescribed in the last section.

Precedent for Petition by Committee of Lunatic.

IN ULSTER COUNTY COURT.

To the County Court of Ulster County:

The petition of Thomas Snyder, of Marletown, Ulster county, New York, as the committee of the person and property of Cornelia DuBois, an idiot, respectfully shows:

That the said Cornelia DuBois, who resides in the said town of Marletown, with the family of John H. DuBois, her deceased brother, was, on the 14th day of May, 1887, duly adjudged an idiot by virtue of an inquisition theretofore duly ordered by the County Court of Ulster county, and your petitioner was duly appointed the committee of her person and property by an order of said court made on the 25th day of June, 1887; and your petitioner thereupon duly qualified as such committee and entered upon his duties as such.

That the said Cornelia has no personal property except her clothing, which does not exceed the sum of \$200 in value. That she is incapable, because of her mental condition, of earning any thing toward her support. That the only real estate owned by said idiot is an undivided one-third of a certain farm in said town of Marletown, which was purchased by Wessel DuBois, her father, from Henry O. Lawrence, and containing about one hundred and seventy acres. That the said idiot now is living on said farm, in the family of her deceased brother, John H. DuBois. That the other undivided two-thirds of said farm is owned, as tenants in common, by the infant children of the said John H. DuBois, deceased, who are named as follows: Huldah, Rachel M., Benjamin, Salina, Mary C., DeWitt, Charles and Catherine DuBois, and subject to the dower right of their mother, Hannah DuBois, in said two-thirds. That the value of the real estate owned by the said idiot would not exceed the sum of about \$7,500. That the said idiot personally has never received any income from her interest in said farm, she having made her home with her said brother and his family, and they having had the benefit of the use of her part of said farm. That the fair rental value of the inter-

est in said farm, after paying taxes, insurance and ordinary repairs, would be the sum of not exceeding \$350 annually.

That the sale of the real estate of the idiot, or of a portion thereof, is necessary to procure funds for her support, and also to pay any claims which may be established against said idiot for her support in the past.

That there is an opportunity of selling a portion of such real estate, and the portion to be sold is hereinafter particularly described, to one George Wood, for the sum of \$6,000, for the interest of the said idiot therein. That the widow and children of the said John H. DuBois have agreed to sell their undivided two-thirds of said premises to said George Wood at the price of \$12,000, and an order of this court has been granted directing a sale of the interest of said infants in said property to the said Wood at that price. That the said idiot has a title in fee-simple in such one third, and it is important to complete said sale to said Wood, as sales of real estate are not of frequent occurrence, and if this sale is not completed it may be a long time before another opportunity may present itself. That the premises proposed to be sold to said Wood are the undivided one-third of the following described premises. (Here insert description.)

That your petitioner is informed and believes that the estate of John H. DuBois, deceased, and Hannah DuBois, have claims against the said idiot for her clothing and support, but the exact amount of such claims this petitioner is not able to state.

Your petitioner, therefore, prays that the said real estate of said idiot, hereinbefore particularly described, may be sold by and under the direction of this court; that Thomas Snyder, of said town of Marbletown, who is not related to said idiot, but who is the committee of her person and estate, duly appointed, may be appointed her special guardian with respect to this proceeding, and that all such proceedings may be had in the premises as may be proper and necessary for that purpose, and Jacob L. Snyder and Silas Snyder, each of said county, are proposed as sureties for the said Thomas Snyder as such special guardian, to join with him in such penalty and upon such conditions as may be required.

Dated June 28, 1887.

THOMAS SNYDER.

(Add verification as to pleading.)

I hereby consent to be appointed the special guardian for the above idiot, with respect to the proceedings and for the purposes mentioned in the above petition.

THOMAS SNYDER.

(Add acknowledgment.)

ULSTER COUNTY, ss.:

Daniel Coddington, of Marbletown, said county, and Silas Sheely, of said town, being each severally sworn, doth each for himself depose and say, that he is acquainted with the above-named idiot and her pecuniary circumstances, and that the material facts and circumstances alleged in the foregoing petition are true, and that they are each of them disinterested.

(Jurat.)

(Signatures.)

Precedent for Bond.

Know all men by these presents, that we, Thomas Snyder, Jacob L. Snyder and Silas Snyder, all of Marbletown, said county, are held and firmly bound unto Cornelia DuBois, of said town, who was, by the County Court of Ulster county, duly declared an idiot, by an order of date of June 1, 1887, in the sum of \$15,000, to be paid to the said Cornelia DuBois, her heirs, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 12th day of July, 1887.

WHEREAS, On the 25th day of June, 1887, the above-bounden Thomas Snyder, by order of the Ulster County Court, was appointed the committee of the person and property of said lunatic, and was this day by said court duly appointed the guardian of said idiot in this proceeding: Now, therefore, the condition of this obligation is such that if the above-bounden Thomas Snyder shall faithfully discharge his said trust as the guardian of the above-named idiot for the purpose of selling and disposing of certain real estate belonging to said idiot, and shall pay over, invest and account for all moneys received by him as such guardian in the special proceedings, according to the directions of any court having authority to give directions in the premises, and shall observe the directions of the court in relation to the said trust, then this obligation to be void; otherwise to remain in full force and virtue. (Signatures.) [L. S.]

(Add justification and acknowledgment.)

Precedent for Petition for Sale of Infant's Real Estate for Payment of Debts.

IN THE ULSTER COUNTY COURT.

To the County Court of the County of Ulster:

The petition of Claud Snyder, an infant under the age of fourteen years, by Mary A. Snyder, his mother and next friend, respectfully shows to this court that your petitioner, Claud Snyder, is an infant, who became four years of age on December 6, 1884, and that he resides with his said mother in the town of Rosendale, said county and State of New York; that said infant has no father and no general guardian; that said infant is the only child and heir at law of William Snyder, deceased, late of said town of Rosendale, who died intestate, March 17, 1883; that the only property belonging to said infant is the property which he inherited from his said father; that such property, so inherited by said infant, consisted of real estate as follows: A dwelling-house and about three acres of land connected with it of the value of about \$2,500; also a wood lot in said town containing about seven acres, of the value of about \$200, and a lot of thirty acres in said town, hereinafter particularly described, which is of the value of about \$1,500; that neither of said lots are incumbered and now belong to said infant, subject to the dower right therein of Mary A. Snyder, the mother of said infant; the thirty-acre lot and the wood lot are unoccupied, and the dwelling-house lot is occupied by the said Mary A. Snyder and said infant; that the household furniture of the

deceased was not sufficient in value to make up the \$150 which the widow was entitled to out of the household furniture; that on May 29, 1883, the said widow and her brother, Stephen S. Mowle, were appointed administratrix and administrator of William Snyder, deceased, and have collected in and converted into money all the personal property of the deceased, except the household furniture claimed by the widow, and the same amount to the sum of \$296.32; that the administrators make no claim for commissions or personal expenses; that the said administrators have duly advertised for the presentment of claims against the estate of the deceased to be made to them, such advertisements being made under the order of the surrogate of Ulster county.

That the following claims have been presented, and which, as your petitioner verily believes, constitute all the debts and liabilities of the deceased.

That said amounts are stated without interest being added.

Benjamin F. Snyder, Brooklyn, N. Y.....	\$50 00
Lillie Snyder, Brooklyn, N. Y.....	325 00
D. D. Addis & Son, East Kingston.....	30 40
Robert Herdman, Eddyville.....	20 15
Anthony D. Relyea, Creek Locks.....	62 12
Newton Davis, Eddyville.....	14 30
Geo. C. Smith, Rondout.....	29 50
A. E. Porter, Creek Locks.....	9 46
• George Milham, Creek Locks.....	9 00
Van Wagonen & Schwarman, Creek Locks.....	8 84
Stephen S. Mowle, Creek Locks.....	250 00
Bills paid by the administrator for doctors' bills, funeral expenses and expenses in settling the estate.....	231 61
	<hr/>
	\$1,040 38

That of the personal property, \$296.32, the widow claims as follows, by law, the sum of \$150. That the mother of the said infant is of the age of twenty-eight years, and is willing to take the present value of her dower interest in the real estate, the sale of which is hereby applied for, to be computed by the usual tables fixing such present value.

That the said dwelling-house produces an income of about \$48 per year, a sum not more than sufficient to pay taxes, insurance and repairs. That said wood lot does not produce any income.

That the said thirty-acre lot produces an income of about \$40 a year.

That to pay the debts of the said deceased, and to discharge the real estate of the said infant from the lien of said debts, authority is hereby asked to sell the following real estate of said infant, being the said thirty-acre lot, and which lot is described as follows:

All that certain lot or piece of land situate and lying in the said town of Rosendale, and bounded and described as follows: On the north by lands of John McAvoy; on the west by lands of Connelly & Shaffer, the Hudson River Cement Company, and George Freston; on the south by lands of Peter C. Lefever and David I. Gue, and on the east by lands of Peter C. Lefever, John Freston and Patrick Lowrey, containing about thirty acres, subject, however, to whatever right

the Hudson River Cement Company may have in said lot. That the interest of the infant in said lot is an estate in fee subject to the dower of his mother.

That an opportunity is now offered to sell such real estate for the sum of \$1,500, which is supposed to be a fair price therefor, and the mother of said infant is willing to convey her dower interest in said real estate at that valuation.

That this proceeding is taken to avoid the expense and delay of an application to the Surrogate's Court to sell such real estate to pay the debts of said William Snyder, deceased.

Your petitioner, therefore, prays that the real estate above described, may be sold by and under the direction of this court; that Stephen S. Mowle, an uncle of said infant, of said town of Rosendale, may be appointed the special guardian of the said infant with respect to this proceeding, and that all such proceedings may be had in the premises as may be proper and necessary for that purpose, and that Peter C. Lefever and Jacob A. Van Wagonen, both of said town of Rosendale, are proposed as sureties for the said Stephen S. Mowle, as such special guardian, to join with him in a bond in such penalty and upon such conditions as may be required.

Dated *the 30th day of April*, 1885.

MARY A. SNYDER.

COUNTY OF ULSTER, ss.:

Mary A. Snyder, of said county, named in the above petition, being duly sworn, says, that she has heard the foregoing petition read and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Subscribed and sworn to before me, {

MARY A. SNYDER.

this 30th day of April, 1880. }

A. VAN BRAMER,
Notary Public.

I hereby consent to be appointed the special guardian for the above-named infant, with respect to the proceedings and for the purposes mentioned in the above petition.

STEPHEN S. MOWLE.

COUNTY OF ULSTER, ss.:

On this 30th day of April, 1885, before me personally came Stephen S. Mowle, to me known, and known to me to be the person who signed the foregoing consent, and acknowledged that he executed the same.

A. VAN BRAMER, *Notary Public.*

COUNTY OF ULSTER, ss.:

Peter C. Lefever and Jacob A. Van Wagonen, each of the town of Rosendale, said county, being each duly sworn, doth each for himself depose and say, that they are acquainted with the above-named infant and his pecuniary circumstances, and that the material facts and circumstances alleged in the preceding petition are true, and that they and each of them are disinterested.

JACOB A. VAN WAGONEN,

Subscribed and sworn to before me, {

PETER C. LEFEVER.

this 2d day of May, 1885. }

J. J. LE FEVER, *Justice of the Peace.*

The general guardian of the infant is the proper person to be appointed special guardian for sale of his real estate. *Matter of Wilson*, 2 Paige, 412; *Matter of Lansing*, 3 id. 265. It was said in *Matter of Tillotsons*, 2 Edw. 113, that a part owner with the infant of land, and who has a claim against the latter's share, is hardly a proper person to be appointed special guardian, but the fact that the relative petitioning for his own appointment as special guardian was a creditor of the infant, and that his claim grew out of a volunteer expense so incurred, does not raise a jurisdictional question. Any error of the court in this respect is to be corrected by appeal or direct proceeding to vacate. *Battell v. Torrey*, 65 N. Y. 294. A special guardian appointed to sell infant's real estate cannot convey such property to himself; where he has done so in good faith, the defect may be cured by opening the proceeding and conveying to a third person. *Buderus v. Immen*, 20 Week. Dig. 88.

Rule 57 provides as follows:

RULE 57. Unless the court otherwise specially directs, the security required on a sale of the real estate of an infant shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond over and above all debts, which bond shall be duly acknowledged and accompanied with affidavits of justification made by the sureties, or a similar bond of the guardian only, secured by a mortgage on improved and unincumbered real estate within the State, of the value of the penalty of the bond.

Where real estate was ordered sold for the benefit of five infants, the guardian giving each infant a separate bond, it was held that the sureties should qualify in the aggregate penalties of the several bonds. *Anonymous*, 4 How. 414. The security cannot be dispensed with, although the petition sets forth the inability of the infants to procure such security. *Matter of Thorne*, 1 Edw. Ch. 507. The rule held that if the bond is not given and filed at the time of applying for leave to mortgage, it cannot subsequently be given in pursuance of an order of the court, a mortgage so given is void, in *Agricultural Ins. Co. v. Barnard*, 26 Hun, 302; is reversed, S. C., 96 N. Y. 525. A bond of a guardian is not void because given before application is made to the court in the matter, especially where the approval and filing were subsequent to the application. *Center v. Sproat*, 22 Hun, 146.

§ 2353. Upon a breach of the condition of a bond, given as prescribed in either of the last two sections, the court must direct it to be prosecuted for the benefit of the person injured.

It is a breach of the condition of a bond where the special guardian fails to make and file a report of the actual disposition of the remainder of the moneys, after paying out the sums directed by the court. There is no warrant for the application of such moneys except the express authority of the court. *Hunt v. Hunt*, 58 N. Y. 666. Before an action can be maintained at law against the sureties upon a bond given upon the appointment of a special guardian, the guardian must be called to account and ordered to pay over by a court of competent jurisdiction, but the sureties are not necessary parties to the proceedings in which the order for payment is made. *Brown v. Balde*, 3 Lans. 283; affirmed as, *Brown v. Snell*, 57 N. Y. 286. Where the guardian is cited and fails to appear, and an order is made fixing a sum in his hands, an action can be maintained against his sureties. *Center v. Sproat*, 22 Hun, 146. Where an order is made requiring the special guardian of an infant to mortgage its real estate and apply the proceeds thereof to the payment of certain specified debts, he cannot, after having received the money, refuse to pay any of the debts, on the ground that the infant is not liable for it. When the guardian renders an account of his proceedings, and procures an order confirming the report without notice to the creditor whose claim he has refused and neglected to pay, such order furnishes him no protection, and the same will, on application of the creditor, be vacated and the guardian directed to pay him the amount in his hands, applicable to the payment of his claim, with interest from date of order of confirmation. *Matter of Lampman*, 22 Hun, 237.

§ 2354. Upon the presentation of the petition, and the filing of the bond, the court must make an order, appointing a suitable person a referee, to inquire into the merits of the application. The referee must examine into the truth of the allegations of the petition; hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application; and report his opinion thereupon, together with the testimony, with all convenient speed.

It was held in *Matter of McIlvaine*, 15 Abb. 91, that the court could in a clear case dispense with the order of reference in proceedings to sell infants' real estate, but in *Matter of Valentine, a Lunatic*, 72 N. Y. 184, it was held, concurring with views expressed in *Battell v. Torrey*, 65 id. 294, and reversing 10 Hun, 83, as to infants' real estate, that the requirement of the statute as to reference is substantial, and cannot be dispensed with. An omission to refer constitutes a fatal defect in proceedings under the statute. A purchaser under such defective proceedings may move to have

his title perfected by new or amended proceedings, or to have the purchase-money refunded.

Order Appointing Special Guardian, and Referee.

At a term of the Ulster County Court, held at the judge's chambers, in the city of Kingston, on the 12th day of July, 1887:

Present — Hon. William S. Kenyon, *County Judge*.

In the Matter of the Petition of Cornelia DuBois, an Idiot, for the sale of lands.

On reading and filing the petition of Cornelia DuBois, of Marbletown, said county, an idiot, by Thomas Snyder, the committee duly appointed of her person and estate duly executed, praying for the sale of certain premises therein described, and setting forth, among other things; that said premises produce only a small income, that the idiot needs the proceeds of said sale for her support and to pay bills against her for her support in the past; that the interest of said idiot in said premises is an undivided interest, and the other owners wish to sell; and that a sale of such premises would be more for the interests of such idiot and all concerned, which said petition is duly verified and supported, as to its material facts and circumstances, by the affidavits of two disinterested persons, and praying for the appointment of Thomas Snyder, of the town of Marbletown, county of Ulster, and State of New York, as special guardian of said idiot, for the purpose of selling and conveying such premises; and, on motion of William T. Holt, attorney for said petitioner,

It is ordered, that the said Thomas Snyder, on his executing the bond required by law in the penal sum of \$12,000, with two sufficient sureties, approved as to its form, sufficiency and execution by a justice of this court, or the county judge of the county of Ulster, by his approbation indorsed thereon, and filing the same with the clerk of the county of Ulster, be and he is hereby appointed, on such conditions, special guardian of the said idiot, with respect to the proceedings.

And it is further ordered, that it be referred to Walter S. Fredenburgh, who is hereby appointed a referee to inquire into the merits of the application; to examine the said petition; hear the allegations and proof of all persons interested in the property, or otherwise interested in the application, and report his opinion thereon, together with the testimony, with all convenient speed.

And it is further ordered, that no proceedings shall be had upon such reference until the guardian produces a certificate of the said clerk, that the requisite security has been duly proved or acknowledged, and filed agreeably to the order of the court, and showing the name of the officer by whom the same was approved, and that said certificate be annexed to the report.

WM. S. KENYON,
Ulster County Judge.

Referee's Report.

ULSTER COUNTY COURT.

In the Matter of the Petition of Cornelia DuBois, an Idiot, for leave to sell real estate.

COUNTY CLERK'S OFFICE, }
County of Ulster, } ss. :

I do hereby certify that the security required by the order of this court made on the 12th day of July, 1887, in the above matter, to be given by Thomas Snyder, named as special guardian therein, has been acknowledged and duly approved by William S. Kenyon, county judge, and filed in my office, agreeably to the order of this court.

Dated the 18th day of July, 1887.

[L. S.]

ISRAEL SNYDER, *Clerk.*

ULSTER COUNTY COURT.

In the Matter of the Petition of Cornelia DuBois, an Idiot, for leave to sell real estate.

In pursuance of an order of this court, made in the above matter, on the 12th day of July, 1887, by which it was referred to me, the subscriber, as referee, to inquire into the merits of the application; to examine into the truth of the allegations of the petition; hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and report my opinion thereon, together with the testimony, with all convenient speed,—After being duly sworn as such referee, I do report, that the said special guardian has produced before me the certificate required by said order, that the requisite security has been duly acknowledged and approved and filed, and that I have proceeded to examine into the truth of the allegations of the petition; have heard the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and I do report that the same have all been sufficiently proved, and that I am satisfied that all the material facts stated in the said petition are true, and that a sale of the real estate belonging to the said idiot would be for the benefit of said idiot, and that the reasons for my opinion are:

That the interest of said idiot in the premises is an undivided interest; that the other tenants in common wish to sell and have entered into a contract to sell their interest in said premises.

That the idiot has no income or means of support, and needs the proceeds of the sale of the premises for her support, and to pay bills for her support in the past; that the premises yield only a small income, and insufficient to furnish a support for said idiot.

W. S. FREDENBURGH, *Referee.*

Indorsed:—"Ulster County Court—In the Matter of the Petition of Cornelia DuBois, an idiot, for the sale of lands."

1887, July 18, Read on motion.

WM. S. KENYON,

Ulster County Judge.

Precedent for Referee's Report, Sale of Infant's Real Estate for Payment of Debts.

ULSTER COUNTY COURT.

In the Matter of the Petition of Claud Snyder, an Infant, for the sale of lands.

COUNTY CLERK'S OFFICE, } ss. :
County of Ulster,

I do hereby certify that the security required by the order of this court, made on the 2d day of May, 1885, in the above matter, to be given by Stephen S. Mowle, named as special guardian therein, has been acknowledged and duly approved by William S. Kenyon, judge of Ulster county, and filed in my office, agreeably to the order of this court.

Dated the 4th day of May, 1885.

[L. S.]

M. S. DECKER,
Deputy Clerk.

ULSTER COUNTY COURT.

In the Matter of the Petition of Claud Snyder, an Infant, for the sale of lands.

In pursuance of an order of this court, made in the above matter, on the 2d day of May, 1885, by which it was referred to me, the subscriber, as referee, to inquire into the merits of the application; to examine into the truth of the allegations of the petition; hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and report my opinion thereon, together with the testimony, with all convenient speed,—After being duly sworn as such referee, I do report that the said special guardian has produced before me the certificate required by said order; that the requisite security has been duly acknowledged and approved and filed, and that I have proceeded to examine into the truth of the allegations of the petition; have heard the allegations and proofs of all persons interested in the property, or otherwise interested in the application, and I do report that the same have all been sufficiently proved, and that I am satisfied that all the material facts stated in the said petition are true, and that a sale of the real estate belonging to the said infant would be for the benefit of said infant, and that the reasons for my opinion are:

That William Snyder, father of said infant, died intestate at Creek Locks, Ulster county, N. Y., on or about March 17, 1883, seized in fee of about three acres of land at Creek Locks, with dwelling-house thereon in which he lived at the time of his death, also a wood lot of about seven acres, situate in the town of Rosendale, Ulster county, N. Y.; also a lot of land comprising about thirty acres, situate in the town of Rosendale aforesaid, and leaving Mary A. Snyder, widow, and Claud Snyder, then of the age of two years, and Frank Snyder, age of six months, sole heirs at law him surviving.

That letters of administration were thereafter issued upon his estate to his widow, Mary A. Snyder, and Stephen S. Mowle, and that they have converted all the personal property of their said intestate into money, except the household furniture, which does not exceed in value \$150, and that the proceeds of such personal property, in the aggregate, amounts to \$296.32.

That the said widow, Mary A. Snyder, claims and will take the \$150 allowed her by law out of the said sum of \$296.32, and that the administrators have agreed and will release their claims for fees and charges against the said estate, which will leave in their hands the sum of \$146.32 for the payment of debts and the expenses of administration. That said administrators have advertised for creditors to present their claims against the estate of said William Snyder, intestate, and that the time for the presentation of such claims has expired, and that the following claims have been presented and are valid and subsisting debts against said decedent's estate, and are just demands and owing:

Benjamin F. Snyder, Brooklyn, N. Y.....	\$50 00
Lillie Snyder, Brooklyn, N. Y.....	325 00
D. D. Addis & Sons, East Kingston, N. Y.....	30 40
Anthony D. Relyea, Creek Locks, N. Y.....	62 12
George C. Smith, M. D., Rondout, N. Y.....	29 50
A. E. Porter, Creek Locks, N. Y.....	9 46
George Milham, Creek Locks, N. Y.....	9 00
Van Wagoner & Schawarman, Creek Locks, N. Y.....	8 84
Stephen S. Mowle, Creek Locks, N. Y.....	250 00
Robert D. Herdman, Eddyville, N. Y.....	6 61
Newton Davis.....	14 30
	<hr/>
	\$795 23

That besides the above claims of \$795.23, the administrators have advanced out of their own funds and paid valid and subsisting debts against said decedent's estate as follows:

<i>Kingston Daily Leader</i> , for publishing notice to present claims.....	\$13 25
Deed for cemetery lot.....	15 00
John Newkirk, Wm. Snyder's funeral.....	37 00
George L. Wachmeyer, Frank Snyder's funeral.....	27 00
Town tax on real estate, 1883.....	33 76
Town tax on real estate, 1884.....	20 10
School tax, 1883.....	7 00
Louis Wooster, carriages for funeral.....	15 00
Insurance on property.....	10 50
Tombstone, Osterhoudt & Dart.....	53 00
	<hr/>
	\$231 61

That the funeral charges are just and reasonable, and that the above amount of \$231.61 is now justly due and owing to Stephen S. Mowle, of Creek Locks, Ulster county, N. Y., who has advanced the

money out of his own funds to take up said claims, and that he holds them against the estate of said decedent.

That the debts against said estate amount, in the aggregate, exclusive of interest, to the sum of \$1,026.84, and that none of them are secured by any judgment or mortgage which is a lien upon decedent's real property.

That the net proceeds of the personal property of said decedent's estate will pay \$146.32 of said debts, leaving \$880.52 unpaid and unprovided for. That the said sum of \$880.52 is chargeable upon said decedent's real estate, the real estate of said infant.

That since the death of the said William Snyder, intestate, his son, Frank Snyder, has died, leaving the infant, Claud Snyder, sole heir at law of his estate, subject to the right of dower and life estate of said Mary A. Snyder therein. That the annual income of all the above real estate is less than \$100 annually, against which there are charges of taxes and insurance, and that the estate has no funds, nor has said infant wherewith to pay said debts, nor is there any way to pay and discharge said debts except the sale of a part of said decedent's real estate, or so much thereof as may be necessary to payment of debts.

That Stephen S. Mowle, special guardian of said infant, has been offered \$1,500 for the thirty-acre lot above mentioned, \$800 thereof to be paid in cash at the signing of the contract, and the balance of \$700 to be paid October 1, 1885, upon the delivery of the deed, and that Mary A. Snyder, the mother of said infant, who is twenty-eight years of age, is willing to unite in the deed at that valuation, and take a gross sum in lieu of her dower and life-estate therein. And I do further report that it will be to the best interest of the said Claud Snyder to sell the said thirty-acre lot for the said sum of \$1,500, and that said sum is a fair and good price for said lot, and that to sell said lot in these proceedings will avoid the expense and delay of an application to the Surrogate's Court for leave to sell such real estate to pay the debts of said William Snyder, deceased, together with the expenses of administration.

I do further report that \$331.95 is the purchasing or gross value of the right of dower of Mary A. Snyder in the said premises, or the proceeds thereof at the valuation of \$1,500.

I do further report that the said sum of \$880.52 is the aggregate of amount of the claims against said estate (exclusive of interest), and that the same should be paid from the proceeds of said sale after the payment of the dower interest of the said Mary A. Snyder, aforesaid.

And I do further report that \$95.44 is the purchasing or gross value of the life interest of Mary A. Snyder, aforesaid, as the mother of Frank Snyder, deceased, in the said premises, or the proceeds thereof at the valuation of \$1,500, after deducting the dower interest aforesaid, and the payment of the debt aforesaid. And I do further report the balance of the proceeds of said sale is the money of, and belongs to said infant, Claud Snyder. All of which is respectfully submitted.

Dated May 13, 1885.

DE WITT ROOSA,

Referee.

Rule 56. The referee appointed on such petition must report as to whether a sale, mortgage or lease of the premises (or any portion, and what portion thereof) would be beneficial to the infant, lunatic, idiot or habitual drunkard, and the

particular reason therefor, and whether the infant, lunatic, idiot or habitual drunkard is in absolute need of having some, and what portion of the proceeds of such sale, mortgage or lease, for the purpose provided in section two thousand three hundred and forty-eight of the Code, in addition to what he might earn by his own exertions; and such referee shall also ascertain and report the value of the property or interest to be disposed of, specifically, as to each separate lot or parcel, and whether there is any person entitled to dower or life estate, or estate for years in the premises, and the terms and conditions on which it should be sold.

And the referee's report shall give such further facts as are necessary or proper on the application. The facts shall be proved on such reference by evidence of at least two disinterested persons, in addition to that of the petitioner, and the report shall not refer to the petition or any other paper for a statement of fact. Under the Chancery practice, it was sufficient for the referee to briefly state the facts, and state that he found the allegations of the petition to be true. *Matter of Morrell*, 4 Paige, 44. But under the rule as it now stands, an order directing the real estate of an infant to be mortgaged for the payment of its debts should contain a statement of the objects to which the avails are to be applied, and should not refer to any other paper for a specification of such objects. The report of the referee in such proceedings should also specify such objects and should not refer to the evidence for a statement thereof. *Matter of Lampman*, 22 Hun, 241.

A deed reciting the appointment of a guardian for infants, in which they were named as parties of the first part without the guardian's name being mentioned, and which was executed and acknowledged by infants and by guardian without the addition of his title to his signature, indicating the character in which he was acting, is not such a conveyance as the purchaser is bound to accept. *Matter of Hyatt*, 11 N. Y. 52. But where an order of Chancery adjudged that the special guardian who signed the petition should execute a sufficient conveyance of the interest of the infants, and a deed was executed by him in his own name, as special guardian, the names of the infants appearing in the deed, it was held to be in proper form, and that it was not necessary to have it executed in the names of the infants. *Cole v. Gourlay*, 79 N. Y. 527.

§ 2355. Upon the filing of the referee's report, and after examining into the matter, the court must make a final order upon the application. In a proper case, a final order, confirming the referee's report, must direct that the real property, or, term, estate, or other interest in real property, or a part thereof, as is necessary, or as justice requires, be mortgaged, let for a term of years, sold, or conveyed, by the special guardian, appointed as prescribed in this title, or by the committee of the property of the lunatic or other incompetent person. The final

order may also contain such directions, respecting the time, manner, and conditions of a sale of conveyance directed thereby, as the court thinks proper to insert therein.

The codifiers, in explaining this section, call attention to the provisions made for disposing of the property of an infant by four different methods. "The first two by mortgage or lease call for no particular remarks; with respect to the remaining methods by sale or conveyance, the former includes the latter, but the converse of the proposition is not true, and the word 'or' has, therefore, been interposed between 'sold' and 'conveyed,' because, where a sale is ordered, for instance, to pay debts, the court does not order a conveyance until after the sale is reported, and where property held in trust is to be conveyed, or a contract of sale is to be specifically performed, the only thing remaining to be done by the court is to order a conveyance and determine the conditions, if any, upon the performance of which it is to be made."

Order for Guardian to Contract.

At a term of the Ulster County Court, held at the judge's chambers, in the city of Kingston, on the 18th day of July, 1887:

Present — Hon. William S. Kenyon, *County Judge*.

In the Matter of the Petition of Cornelia DuBois, an Idiot, for leave to sell real estate.

On reading and filing the report of Walter S. Fredenburgh, referee appointed in the above matter by this court, bearing date the 18th day of July, 1887, from which it appears satisfactorily to this court, that a sale of the estate, right and interest of said idiot in the premises referred to, and the sale of which is asked for in the petition in this proceeding, is required by the interest of such idiot, and for reasons and circumstances in such report stated, and that the interests of all concerned will be promoted thereby; on motion of William T. Holt, attorney for said petitioner, it is

Ordered, that the said report be and the same is hereby confirmed.

And it is further ordered, that Thomas Snyder, the special guardian for said idiot, be and he is hereby authorized and empowered to contract for the sale and conveyance of all the right, title and interest of the said idiot in and to such real estate, subject to the approbation of this court, but not for a sum less than the sum specified by said referee in his report as the value thereof, and upon the terms and conditions in said report specified.

And it is further ordered, that before executing any deed or instrument of conveyance of the said premises to the purchaser thereof, the said guardian report to this court, upon oath, the terms and conditions of the agreement made by him for the sale of such premises, and the name of the purchaser.

WILLIAM S. KENYON, *Ulster County Judge*.

§ 2356. Before a sale, mortgage, or lease can be made, pursuant to the final order, the special guardian, or the committee, must enter into an agreement therefor, subject to the approval of the court; and must report the agreement to the court, under oath. Upon the confirmation thereof, by the order of the court, he must execute, as directed by the court, a deed, mortgage, or lease. Where the final order directs the execution of a conveyance in the first instance, for the purpose of fulfilling a contract, or because the property is held by way of mortgage, or in trust only, the guardian or committee, executing the conveyance, must report the conveyance to the court, under oath.

It is requisite that the special guardian of an infant enter into an agreement in writing, with the purchaser of the real estate, stating the terms of sale. *Matter of Hazard*, 9 Paige, 365. In *Agricultural Insurance Co. v. Barnard*, 26 Hun, 302, it was held that a mortgage given by order of the court was void, because no report of agreement to mortgage was made by the court before the execution of the mortgage, citing *Stillwell v. Swarthout*, 81 N. Y. 109, and *Battell v. Torrey*, 65 id. 294, both of which decisions should be examined by the practitioner in this connection, in view of the fact that the case first cited was reversed. 96 N. Y. 525. The syllabus on reversal states the decision as holding that the requirement that, in case of sale, the sale shall be reported to the court on oath of the committee, and confirmed by the court before a conveyance is executed, does not apply to a mortgage, but the opinion scarcely goes to that point. That decision holds among other things, that the filing of a petition which shows the valid debt of a lunatic requiring the disposition of his property to enable his committee to pay, vests the court with jurisdiction of the subject-matter under the act, and such jurisdiction would not be divested by subsequent irregularities in the proceeding unless they were taken in violation of some express provision of statute. It is also held failure to file a bond is not a jurisdictional defect. In *Battell v. Torrey*, 65 N. Y. 294, it was held that in case of an infant the right to execute a mortgage is by the statute regulating such proceedings made to depend upon a confirmation by the court of the agreement reported, and it was held necessary. It is probable that the different decisions are based upon a difference in the statutes, but as the statute now says as to the bond and the agreement that they *must* be made, it would be unsafe to omit either. The decisions cited were under the Revised Statutes. Other owners may join with the infant in the contract. *O'Reilly v. King*, 28 How. 408.

Agreement to Sell.

ULSTER COUNTY COURT.

In the Matter of the Petition of Cornelia DuBois, an Idiot, for leave to sell real estate.

In pursuance of an order of this court made in the above matter on the 18th day of July, 1887, I, the subscriber, the special guardian therein named, do report, that I have entered into an agreement (subject to the approval of this court), for the sale of all the right, title and interest of the above-named idiot, in and to the premises mentioned in such order and in the petition in this matter, with George T. Wood, of Marbletown, said county, upon the following terms and conditions: the said George T. Wood to pay therefor the sum of \$600 cash, on obtaining a good title to the whole premises, of which this is the undivided one-third, which agreement is hereto attached.

And I do further report, that the terms and conditions on which I have made such agreement, subject to the approbation of this court, are the best terms upon which I could sell the said property, and that, in my opinion, the security above mentioned will be ample security for the payment of the balance of the purchase-money not paid down and the interest thereon.

Dated the 18th day of July, 1887.

THOMAS SNYDER.

COUNTY OF ULSTER, ss.:

Thomas Snyder, the special guardian above named, being duly sworn, says he has heard read the foregoing report by him subscribed, and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me, }
this 18th day of July, 1887.

THOMAS SNYDER.

V. B. VAN WAGONEN, Notary Public.

Report of Special Guardian of Agreement to Sell.

This agreement made and entered into this 18th day of July, 1887, by and between Thomas Snyder, the special guardian of Cornelia Du Bois, an idiot, of Marbletown, of the first part; and George T. Wood, of the same place, of the second part. The party of the first part to sell and convey to the party of the second part, in consideration of the sum of \$600, the premises described in the petition in this proceeding, and the party of the second part to take said premises, at said price, as soon as he is furnished a good title to the whole premises, of which the premises in question is an undivided one-third. Price to be paid when deed delivered.

In witness whereof the parties hereto have set their hand and seals, the day and year first above written.

THOMAS SNYDER,

Special Guardian for Cornelia DuBois.

In presence of

R. BERNARD.

GEORGE T. WOOD.

Order of Confirmation, Sale Idiot's Real Estate.

At a term of the Ulster County Court, held at the judge's chambers, in the city of Kingston, on the 18th day of July, 1887:

Present — Hon. William S. Kenyon, *County Judge*.

In the Matter of the Petition of Cornelia DuBois, an Idiot, for leave to sell real estate. }

On reading and filing the report of Thomas Snyder, the special guardian of the idiot above named, made in pursuance of an order of this court, dated the 18th day of July, 1887, stating that in pursuance of such order he had entered into an agreement, subject to the approval of this court, with George T. Wood, of Marbletown, said county, for the sale of all the right, title and interest of the said idiot in and to the real estate mentioned in said order, upon certain terms and conditions in such report stated: Now, on motion of William T. Holt, attorney for said petitioner, it is

Ordered, that the said report and the agreement therein recited be, and the same are, hereby ratified and confirmed, and that the real property described in said petition be sold and conveyed by said special guardian.

And it is further ordered that the said special guardian, in the name of and for the said idiot, execute, acknowledge and deliver to the said George T. Wood a good and sufficient deed and conveyance of all the estate, right, title and interest of the said idiot in and to the said premises aforesaid, upon his complying with the terms and conditions upon which, by the said agreement, the deed was to be delivered.

And it is further ordered, that out of the said purchase-money the said special guardian pay to the attorney for the petitioner the sum of \$25 for costs of this proceeding, and that he pay to W. S. Fredenburgh, the referee herein, the sum of \$5, and that he retain the balance of said purchase-money as the committee of the person and estate of the said Cornelia DuBois, subject to the direction of this court on giving the security required by law.

WM. S. KENYON,
Ulster County Judge.

Order Confirmation, Sale of Infant's Real Estate.

At a term of the Ulster County Court, held at the judge's chambers, in the city of Kingston, on the 18th day of May, 1885:

Present — Hon. William S. Kenyon, *County Judge*.

In the Matter of the Petition of Claud Snyder, an Infant, for the sale of lands. }

On reading and hearing the report of Stephen S. Mowle, the special guardian of the infant above named, made in pursuance of an order of this court, dated the 13th day of May, 1885, stating that in pursuance of such order he had entered into an agreement, subject to the

approval of this court, with the Hudson River Cement Company, of the town of Ulster, Ulster county, N. Y., for the sale of all the right, title and interest of the said infant in and to the real estate mentioned in said order, upon certain terms and conditions in such report stated: Now, on motion of V. B. Van Wagonen, attorney for said petitioner, it is

Ordered, that the said report and the agreement therein recited be, and the same are, hereby ratified and confirmed, and that the real property described in said petition be sold and conveyed by said special guardian.

And it is further ordered, that the said special guardian, in the name of and for the said infant, execute, acknowledge and deliver to the said Hudson River Cement Company a good and sufficient deed and conveyance of all the estate, right, title and interest of the said infant in and to the said premises aforesaid, upon its complying with the terms and conditions upon which, by the said agreement, the deed was to be delivered.

And it is further ordered, that out of the said purchase-money the said special guardian pay to the attorney for the petitioner the sum of \$90, including \$15, the fees of DeWitt Roosa, the referee herein, for costs of this proceeding, and that he pay to Mary A. Snyder, as payment of the present value of her dower interest in said premises, the sum of \$331.95.

That he pay to said Mary A. Snyder the present value of her life interest in said premises, as mother of her deceased son, \$95.44.

That he pay the debts and funeral expenses of William Snyder, deceased, which, without interest, and after the application of the personal property of the said deceased, amounts to \$880.52, according to the report of the referee herein.

That the balance remaining after the said payment be paid in court for the benefit of said Claud Snyder, by paying the same to the treasurer of Ulster county.

WM. S. KENYON,
County Judge of Ulster County.

V. B. VAN WAGONEN,
Attorney for Petitioner.

Guardian's Deed.

This indenture, made the 15th day of July, in the year of our Lord 1887, between Cornelia DuBois, an idiot, by Thomas Snyder, her special guardian, of the first part, and George T. Wood, of Marbletown, Ulster county, New York, of the second part, witnesseth:

WHEREAS, the above-named idiot, by Thomas Snyder, her committee, heretofore presented to the County Court of Ulster county a petition praying for a sale of the right, title and interest of the said idiot in the premises in said petition mentioned and hereinafter described. Upon which petition, an order of the said court was made at a term thereof held at judge's chambers, in the city of Kingston, county of Ulster, bearing date the 18th day of June, 1887, appointing Thomas Snyder, above named, the special guardian of such infant for the purposes of the said application, and directing that it be referred to Walter S. Fredenburgh, a referee, to ascertain the truth of the facts in such

petition alleged; and thereupon, after the said special guardian had given the security by law required, and the same had been duly approved and filed, such proceedings were afterward had, that by an order of the said County Court, made at a term thereof held at judge's chambers, in the county of Ulster, bearing date the 18th day of July, in the year 1887, it was, among other things, in substance ordered, that the above-named Thomas Snyder, as special guardian of such idiot, be authorized to contract for the sale and conveyance of the right, title and interest of the said idiot in such real estate, for a sum not less than that specified in the referee's report in said order mentioned; and that such sale, with the name of the purchaser, and the terms thereof, be reported to the said court before the conveyance of such premises should be executed; and

WHEREAS, the said special guardian, upon terms and in the manner authorized by the said last-mentioned order, contracted for the sale of the said premises with George T. Wood, for the sum of \$1,200, that being the highest sum offered for the same; and thereupon the said guardian made his report on oath of such agreement to this court, pursuant to the requisitions of the last-recited order, upon which an order was made, at a term of said court, held at the judge's chambers, in the county of Ulster, bearing date the 18th day of July, 1887, confirming such report, approving and confirming such sale, and directing the same to be carried into effect, and ordering the said guardian to execute, acknowledge and deliver a deed of said premises to the said party of the second part on his complying with the terms on which by said agreement the same was to be delivered; and

WHEREAS, the said party of the second part has complied with the said terms: Now, therefore, this indenture witnesseth, that the said party of the first part, by Thomas Snyder, her special guardian, for and in consideration of \$1,200, to him in hand paid, before the ensembling and delivery of these presents, has bargained, sold, granted, released and conveyed, and by these presents does bargain, sell, grant, release and convey unto the said party of the second part, his heirs and assigns forever (insert description), with the possession and claim of the party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances, to have and to hold the same unto the said party of the second part, his heirs and assigns, to them and their only benefit and behoof forever.

In witness whereof, the said party of the first part, by her guardian aforesaid, has hereunto set her hand and seal the day and year first above written.

CORNELIA DuBOIS, Idiot,
By THOMAS SNYDER,
Her Special Guardian.

STATE OF NEW YORK, }
County of Ulster, } ss.:

I certify that on the 24th day of July, 1887, before me appeared Thomas Snyder, to me personally known to be the person described in and who executed the within deed, and acknowledged the execution thereof. (Signature.)

§ 2357 Real property, or an interest in real property, shall not be sold, leased, or mortgaged, as prescribed in this title, contrary to the provisions of a will by

which it was devised, or of a conveyance or other instrument, by which it was transferred, to the infant or incompetent person.

The Supreme Court has no power to direct the sale of an infant's real estate, contrary to terms of the will by which he derives title. *Muller v. Shipman*, 6 Abb. N. C. 343. Under the Revised Statutes, a contingent estate of an infant could not be sold by order of the court. *Matter of Dodge*, 40 Hun, 443. Infants unborn are not seized, hence courts cannot sell their interests, because such interests do not exist; they can sell only interests existing. If a child should be born, it will be vested with the interest in the share substituted for real estate and held by its co-heirs *Bowman v. Tallman*, 28 How. 482. A sale contrary to a will or conveyance by which an infant acquires title is void. *Matter of Turner*, 10 Barb. 552; *Forman v. Marsh*, 11 N. Y. 544. But the provisions of the statute did not apply to a trust estate held by an infant. *Wood v. Mather*, 38 Barb. 473; affirmed, 44 N. Y. 249.

§ 2358. A deed, mortgage, or lease, made, in good faith, as prescribed in this title, either upon an application in behalf of an infant or an incompetent person, or pursuant to the directions contained in a judgment rendered against him, has the same validity and effect, as if it was executed by the person, in whose behalf it was executed, and as if the infant was of full age, or the lunatic, idiot, or habitual drunkard was of sound mind, and competent to manage his affairs.

An order directing the sale of real estate of infants, though binding on them so as to protect the purchaser, does not settle the rights of the infants among themselves. *Davison v. DeFreest*, 3 Sandf. Ch. 456. Where an order appointing a special guardian was fraudulently obtained, it and all subsequent orders and proceedings founded thereon were set aside, annulled and vacated, and the proceedings declared void. *Clark v. Underwood*, 17 Barb. 202. In proceedings for sale of infants' real estate under the statute, where the referee reported that the infant owned an undivided one-half of the premises, and that was the belief of parties during the proceedings, and a sale was ordered, made and confirmed, and it was determined on ejectment that the infant owned only one-third of the premises, the special guardian was required to refund a proper proportion of the purchase-money. *Matter of Price*, 67 N. Y. 231; affirming 6 Hun, 513. In *Cole v. Gourlay*, 79 N. Y. 527, the effect of proceedings of this character are discussed in connection with an action of ejectment prosecuted by reason of discovery of a lost will, and the validity of the proceedings are passed upon. The purchaser under such proceedings has a right to a determination of their invalidity in case of a statutory omission, and the proceedings should

be amended, or new proceedings taken, or the money paid should be refunded. *Matter of Valentine*, 72 N. Y. 184.

§ 2359. A sale of real property, or of an interest in real property, of an infant or incompetent person, made as prescribed in this title, does not give to the infant or incompetent person, any other or greater interest in the proceeds of the sale, than he had in the property or interest sold. Those proceeds are deemed property of the same nature, as the estate or interest sold, until the infant arrives at full age, or the incompetency is removed.

The doctrine that the sale of an infant's real estate gives him no greater interest in the proceeds than he had in the property, is a general principle of equity jurisprudence, and will be enforced. If the infant die under age, the proceeds will be subject to the same law of succession as the property which produced them. *Sweeney v. Thayer*, 1 Duer, 286. Where the shares of several infants were determinable fees, with executory devises to the survivors, and the whole estate in the land was sold, it was held on the death of one of the infants, by which the devise over of her share would have taken effect if the land had not been converted, that her share of the proceeds must be paid to the executory devisees, and that her personal representatives had no right to such share. *Davison v. DeFresst*, 3 Sandf. Ch. 456. The object of the statute was to preserve, during the infant's minority, the character of the property in reference to the statutes regulating descents and distribution. But the character thus impressed upon the proceeds ceases when the infant arrives at his majority and obtains possession of the fund. *Forman v. Marsh*, 11 N. Y. 544. Same rule is held, *Matter of Finch*, Clarke's Ch. 538. This is true where lands have been partitioned. *Matter of Thomas*, 1 Hun, 473. As also in case of real estate of a lunatic. *Cutting v. Lincoln*, 9 Abb. (N. S.) 436.

§ 2360. From the time of the filing of a petition, by or in behalf of an infant, praying for an order directing a conveyance, or a sale, mortgage, or lease of his real property, or of an interest in real property, the infant is considered a ward of the court, with respect to that real property or interest, and the income and proceeds thereof.

The Supreme Court, like the Court of Chancery, exercises general supervision and control over the estates of infants. *LeFever v. Laraway*, 22 Barb. 167; *People v. Erbert*, 17 Abb. 395. The County Court, in exercising the power conferred on it by law, to order the sale of an infant's real estate within the county, has the same general powers as the old Court of Chancery, and the general rules of equity jurisprudence are applicable. *Brown v. Snell*, 57 N. Y. 286. It is said, however, in *Stiles v. Stiles*, 1 Lans. 90, that the sale of infants' real estate by County Court does not constitute them wards of the court.

The same rule as held in *Brown v. Snell*, *supra*, is held in *Matter of Price*, 67 N. Y. 231, and it is said that from the time of the application the infant is to be considered the ward of the court so far as relates to the property affected, its proceeds, or income. The special guardian is an officer of the court, and so long as the proceeds remain in his hands, and until the infant arrives at majority and receives it, the court has control over it and over the proceeding. It may correct any irregularities or errors on the part of its officers in the proceedings so as to protect a party likely to suffer thereby. See, also, *Matter of Mathews*, 27 Hun, 254. Where a special guardian took a mortgage on the premises to secure a part of the purchase-money, and afterward foreclosed the mortgage, bid off the property, and took a deed of it to himself personally, it was held that he took title as trustee for his ward. *Dodge v. Thompson*, 13 Week. Dig. 104; same principle, *Valentine v. Belden*, 20 Hun, 537. The Supreme Court had jurisdiction under Revised Statutes to compel a guardian, who was appointed by the County Court to sell real estate, to pay over money in discharge of his trust. *Spelman v. Terry*, 74 N. Y. 448; affirming 8 Hun, 205.

§ 2361. The court must, by order, direct the disposition of the proceeds of such a sale, mortgage, or lease. It must direct the investment of any portion thereof, belonging to the infant or incompetent person, which is not needed for the payment of debts, or the safe-keeping, or the immediate maintenance and education, of himself or his family. It must require a report, under oath, of the disposition and investment thereof, to be made as soon as practicable, and must compel periodical accounts to be rendered thereafter, by each person, who is intrusted with the proceeds or any part thereof.

Rule 58 reads as follows :

If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security, by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. If the infant's interest in the property does not exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty-five dollars, and referee's fees not exceeding ten dollars. Where several infants are interested in the same premises, as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

Rule 59 is as follows :

No moneys arising from the sale of the real estate of an infant shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support or maintenance, unless such guardian has previously given security on improved and unincum-

bered real estate, to account to the infant for the same, in the usual form. No order shall be made for the payment of any such moneys, to any person claiming the same, except upon petition, accompanied by a certified copy of the order, in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the fund, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition, as shall be deemed proper, or may refer the same to a suitable person to take proof and report thereon.

When the income of an infant is insufficient for its support, the court will sanction application of principal if the proceedings seem to be wise and for the infant's welfare. *Matter of Bostwick*, 4 Johns. Ch. 160; *Voessing v. Voessing*, 4 Redf. 360. A special guardian is not prohibited from taking securities in his own name, but if the fund is to be invested until the majority of the infants, he cannot receive the principal meanwhile without the order of the court, nor can he receive the interest, except so much as may be necessary for the infant's support, etc. *Swarthout v. Oaks*, 52 Barb. 622. Where a special guardian applied the proceeds of real estate of his ward to payment of debts of the father of the ward, of whom the guardian was the administrator, and from whom the land came to the infant, the act was held to be unwarranted in the absence of authority from the court. *Hunt v. Hunt*, 58 N. Y. 666.

Precedent for Certificate of Officer of Court to be attached to Petition.

ULSTER COUNTY COURT.

In the Matter of the Petition of William N. Schwab, an Infant, for leave to sell real estate.

I hereby certify that there is now on deposit in this office, to the credit of William N. Schwab, in the above matter, the sum of \$457, and that if the amount is allowed to remain in this office until after January 1, 1884, it will be entitled to interest from July 1, 1883, at the rate of three per cent per annum.

December 27, 1883.

JOHN DERRENBACHER,
County Treasurer of Ulster County.

Precedent for Petition to draw Money out of Court.

ULSTER COUNTY COURT.

In the Matter of the Application of William N. Schwab, an Infant, for leave to draw money out of court.

To the County Court of Ulster County:

The petition of George N. Schwab, by Gertrude Schwab, the mother

and general guardian of said infant, and the said Gertrude Schwab, in her own behalf, respectfully shows to this court:

That said petitioners are resident of the city of Kingston, said county. That the said William N. Schwab became of the age of eighteen years on the 22d day of March, 1882. That the said Gertrude Schwab has been, by the surrogate of Ulster county, duly appointed the general guardian of the person and estate of said William N. Schwab.

That on or about the 22d day of April, 1882, in proceedings in this court entitled "In the Matter of the Petition of William N. Schwab, an Infant, for leave to sell real estate," an order was granted directing a sale of the interest of the said infant in certain real property on Union avenue in said city, and directing that of the proceeds of the sale of the interest of said infant in said real estate, the sum of \$2,050 be paid into court to the credit of said infant, and interest to be paid to his general guardian during his infancy, and the principal to be paid to him when he should have become twenty-one years of age. That in pursuance of such order said sum was so deposited in said court, by paying the same to the county treasurer of said county. That some of said money has since been drawn out, by order of the court, and that there is now in the hands of said treasurer, to the credit of William N. Schwab, the sum of \$457, and interest, as will be seen by the certificate of said treasurer, which is hereto annexed.

That of said money paid into court, there has been drawn out the sum of \$1,593, and expended in the purchase of a house in the said city of Kingston, the title to which is in the said William N. Schwab.

That the petitioner, Gertrude Schwab, expended of her own money in the repairs of said house, more than the sum of \$450, and that the property of the said William N. Schwab has been benefited by such expenditure to the amount of more than \$450. That such expenditure was made at the request of the said William N. Schwab, and for his benefit. That the said Gertrude Schwab has need of the sum of \$457, and prays that that amount of the money she has expended from her private funds in the improvement of the real estate of the said William be repaid to her.

These petitioners, therefore, pray for an order of this court directing the county treasurer of Ulster county to pay the funds in his hands to the credit of the said William N. Schwab, and the interest due thereon, when the same may be drawn, to the said Gertrude Schwab, or to her attorney, Ashley W. Cooper, and your petitioners will ever pray.

WILLIAM N. SCHWAB,
GERTRUDE SCHWAB.

Dated December 27, 1883.

(Add verification as to pleading.)

Precedent for Order to draw Moneys, etc.

At a term of the County Court of Ulster county, held at the chambers of the judge thereof, in the city of Kingston, said county, on the 4th day of August, 1884:

Present—Hon. William S. Kenyon, *County Judge of Ulster County.*

In the Matter of the Petition of William N. Schwab, an Infant, for leave to draw money out of court.

On reading and filing the petition in the above matter, verified this day by William N. Schwab and Gertrude Schwab, his general guardian, praying that money now on deposit in court to the credit of the said William N. Schwab, in the matter of the petition of Julius G. Schwab and William N. Schwab, infants, for leave to sell real estate, be paid to said general guardian for the maintenance and support of said infant:

Now, on motion of Ashley W. Cooper, the attorney of said petitioner, on proof of the facts and matters stated in the petition, it is hereby

Ordered, that the treasurer of Ulster county pay the balance of the money on deposit to the credit of the proceedings herein named to sell real estate, as follows:

To Ashley W. Cooper, the sum of \$25, as his costs and disbursements in this proceeding, and the balance thereof to Gertrude Schwab, as such general guardian, to be applied to the support and maintenance of the said William N. Schwab.

WILLIAM S. KENYON,
County Judge of Ulster County.

Costs.—It was held in *Matter of Morrell*, 4 Paige, 44, that if several infants were interested in several parcels of land, sold at different times, an allowance might be made for the extra expense beyond the \$25 fixed by the rule. In *Spellman v. Terry*, 74 N. Y. 448, an allowance of \$60 as referee's fees was affirmed. There is no statute providing for commissions to be paid to special guardians in such proceedings, nor is there any fixing the costs and expenses which may be allowed in conducting the same, and no provision is made for attorney's fees, or the expenses of a reference; all the costs and allowances which can be charged on the fund, are in the discretion of the court, and are fixed and provided in the standing rules. *Matter of Mathews*, 27 Hun, 255. The filing of inventories and accounts by the special guardians will be specially enforced. *Matter of Seaman*, 2 Paige, 409.

§ 2362. Where the real property, or the estate, term, or other interest in real property, directed to be sold, is subject, absolutely or contingently, to a right of dower, or an estate for life, or is subject to an estate for years, in the whole or any part thereof, the person, having the prior right or estate, may manifest in writing his consent, either to receive, from the proceeds of the sale, a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of his right or estate; or to have a proportionate share of the proceeds of the sale invested, and the interest thereof paid to him, from the time of the investment, or of the commencement of his right or estate, as justice requires, until the determination of his right or estate. Upon filing the consent with the clerk, the final order may, in the discretion of the court, direct a sale of the entire property, to which the right or estate attaches. In such a case, the court must, after the sale, ascertain the value of the right or interest of the person so consenting; and the final order must either direct the payment, from the proceeds of

the sale, of the gross sum so ascertained as the value, or the investment of a just proportion of the proceeds, and the payment to him of the interest thereof. But such a gross sum shall not be paid, nor shall such an investment be made, until an effectual release of the right or estate of the person so consenting, executed to the satisfaction of the court, and duly acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, has been filed with the clerk.

§ 2363. Where the interest of the infant, or of the lunatic, or other incompetent person, consists of a right of dower, or an estate for life, or for years, the final order may authorize the special guardian or committee to join, with the person or persons holding the reversionary estate, in a conveyance of the property to which the interest attaches, so as to release the right of dower, or fully convey the particular estate, on receiving, from the proceeds of the sale, a gross sum, in satisfaction of that interest, or a proportionate part of the proceeds, to be invested until the determination of the particular estate; and, in either case, to be ascertained as prescribed in the last section. Where a proportion of the proceeds is so received by the guardian or committee, for investment, the final order must provide for the investment thereof, until the determination of the particular estate; and then for the payment thereof to the person entitled thereto.

§ 2364. In the application of money, arising from a sale, mortgage, or lease, made for the purpose of paying debts, as prescribed in this title, the special guardian of the infant, or the committee of the property of the incompetent person, must pay all debts, in equal proportion, without giving a preference to a debt founded upon a specialty, or upon which judgment has been taken.

After the sale has been consummated by the payment of the purchase-money and the delivery of the deed to the purchaser, the guardian should make a final report of his proceedings to the court, stating what deduction has been made from the proceeds for costs, whether an effectual release of the widow's dower right has been obtained, and the disposition that has been made of the balance of the proceeds. An order should then be obtained confirming the report, and the sale and conveyance and disposition of the proceeds, and also requiring the guardian to render periodical accounts. *Bennett v. Byrne*, 2 Barb. Ch. 217.

Final Report of Special Guardian.

ULSTER COUNTY COURT.

In the Matter of the Petition of Cornelia DuBois, an Idiot, for leave to sell real estate.

To the County Court of the County of Ulster:

I, Thomas Snyder, special guardian in the above matter, having, by an order of this court, made on the 18th day of July, 1887, been authorized and empowered to execute, acknowledge and deliver to the purchaser of the interest of said idiot in the real estate mentioned and described in the petition in these proceedings, a conveyance, for a sum not less than \$3,600, do hereby certify and report, that I have

executed such conveyance as in and by said order directed, and that I have received therefor \$3,600, as follows: Amount paid in full in cash. That out of said sum of \$3,600 I have paid the sum of \$200 for the costs and expenses of these proceedings, and \$200 to John Churchwell to satisfy his interest in said premises; and that I have taken from the said John Churchwell a discharge in full of his interest; and that I have disposed of the residue of said sum in the manner directed by this court, as follows, to-wit: (Here insert manner of disposition of same.)

THOMAS SNYDER,
Special Guardian.

Dated July 25, 1887.

COUNTY OF ULSTER, ss.:

Thomas Snyder, the special guardian above named, being duly sworn, says he has heard read the foregoing report by him subscribed, and knows the contents thereof, and that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

THOMAS SNYDER.

Subscribed and worn to before me, }
this 25th day of July, 1887. }

JOHN HAMMOND,
Notary Public.

Final Order Confirmation Sale Infant's Real Estate.

At a term of the Ulster County Court, held at the judge's chambers, in the city of Kingston, in the county of Ulster, on the 12th day of August, 1887:

Present—Hon. William S. Kenyon, *County Judge.*

In the Matter of the Application of
Cornelia DuBois, for leave to sell real
estate. }

On reading and filing the report of Thomas Snyder, special guardian of Cornelia DuBois, the above-named idiot, bearing date the 25th day of July, 1887, on motion of V. B. Van Wagonen, attorney for said guardian, it is ordered that the said report be and the same hereby is, in all things, ratified and confirmed.

WILLIAM S. KENYON,
Ulster County Judge.

CHAPTER XX.

ARBITRATIONS.

Arbitration existed at common law and was early recognized by the statutes of this State. Under the Revised Statutes a complete system was introduced providing for the conduct of arbitrations and the enforcement of awards by the entry of judgment thereon, saving the

necessity of an action on the bond. It was also provided that appeals might be taken from the award, and the manner of vacating, modifying and correcting them was prescribed. The present codification has made but slight changes. The question as to how far the statutes have affected the common-law right to submit to arbitration, is discussed, *Cutter v. Cutter*, 48 N. Y. Super. 470. The weight of authority seems to be in favor of the proposition that the common-law right exists to submit matters to arbitration by parol. That other arbitrations are controlled by the statute, at least in part. *Wells v. Lain*, 15 Wend. 99; *Diedrick v. Richley*, 2 Hill, 273; *Cope v. Gilbert*, 4 Denio, 347; *Bloomer v. Sherman*, 5 Paige, 575; *Ross v. Luther*, 4 Cow. 159. But all the provisions of the statute apply only to those cases where the submission is in writing and authorizes a judgment to be entered on the award. *French v. New*, 20 Barb. 482. Where the submission is by parol, the statute has no application. *Cope v. Gilbert*, 4 Denio, 348; *Valentine v. Valentine*, 2 Barb. Ch. 430. A parol agreement to submit matters which cannot be determined by a parol arbitration is void. *French v. New*, 2 Abb. Ct. App. 209; S. C., 28 N. Y. 147. Arbitration relates only to the submission of matters for final determination, not to the decision of a collateral fact. *Elmendorf v. Harris*, 5 Wend. 516; *Garr v. Gomez*, 9 id. 649. In *Elmendorf v. Haws* arbitration is defined as "a submission by parties of matters in controversy to the judgment of two or more individuals who are substituted in place of a judicatory established by law, and who are to decide the controversy. It is called a domestic tribunal, and the arbitrators judges of the parties choosing." The act by which parties submit their grievances to the tribunal is called a "submission," the persons selected as judges are termed "arbitrators," and their decision is an "award."

A court of equity will not compel specific performance of an agreement to arbitrate. *Sinclair v. Talmadge*, 35 Barb. 602; *Dunnell v. Keteltas*, 16 Abb. 205; S. C. affirmed, 26 How. 599; *Hurst v. Litchfield*, 39 N. Y. 377. And a statute making arbitration compulsory is held unconstitutional, as depriving a party of trial by jury. *People v. Haws*, 37 Barb. 440. In *President, etc., of the Delaware and Hudson Canal Company v. Pennsylvania Coal Company*, 50 N. Y. 250, the authorities upon the binding force of agreements to arbitrate are collated and discussed, and it is said that there are two classes of cases; in one class of cases the parties undertake, by an independent agreement, to provide for the settle-

ment of all disputes by arbitration, to the exclusion of the courts; such an agreement is no bar to an action, the agreement only entitling the party to damages. In the other class of cases the agreement which creates the liability qualifies the right by providing that before the right of action accrues, damages shall be determined, or amounts and values ascertained, and this is made a condition precedent; this condition is lawful and the courts will give full effect to it. It is further held that the rule that an agreement to arbitrate is not sufficient to oust a court of law or equity of jurisdiction, is a departure from the general principle that effect should be given to contracts when lawful in themselves according to their terms and the intent of the parties, and it will not be extended or applied to new cases not coming within the letter or spirit of the decisions already made. A large number of cases will be found to be cited and commented upon, and the conclusions arrived at are reached after thorough investigation.

§ 2365. A submission of a controversy to arbitration cannot be made, either as prescribed in this title or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs, by reason of lunacy, idiocy or habitual drunkenness.
2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person, capable of entering into a submission, has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection, on the ground of incapacity, can be taken only in behalf of the person so incapacitated. And the second subdivision of this section does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands, or the admeasurement of dower.

§ 2366. Except as otherwise prescribed in the last section, two or more persons may, by an instrument in writing, duly acknowledged or proved and certified, in like manner as a deed to be recorded, submit, to the arbitration of one or more arbitrators, any controversy existing between them at the time of the submission, which might be the subject of an action. They may, in the submission, agree that a judgment of a court of record, specified in the instrument, shall be rendered upon the award made pursuant to the submission. If the Supreme Court is thus specified, the submission may also specify the county in which the judgment shall be entered. If it does not, the judgment may be entered in any county.

Who May Arbitrate.

The general principle is that where there is power to contract with a liability to pay, there is power to arbitrate. This includes a married woman, a corporation and a guardian on behalf of a ward. *Weed v. Ellis*, 3 Caines, 253; *Brady v. Mayor of Brooklyn*, 1

Barb. 584 ; *Palmer v. Davis*, 28 N. Y. 242. See *Jones v. Phoenix Bank*, 4 Seld. 228. In order to make the decisions of a majority of the arbitrators binding upon a question submitted to them under section 2366, the submission must be in writing, acknowledged, proved or certified as a deed is required to be, for the purpose of being recorded ; upon any other submission the whole number of arbitrators must agree according to the common-law rule ; the section, however, only applies to submissions made under this title. *Lorenzo v. Deery*, 26 Hun, 447. A liberal construction will be given to the submission and award of arbitrators, so as to uphold the award when not attacked for corruption or misconduct of the arbitrators. *Curtis v. Gokey*, 68 N. Y. 300. An agent entering into a submission in his own name is personally bound by the award. *Smith v. Van Ostrand*, 5 Hill, 489. But the principal may ratify the act of his agent and thus become bound by the award. *Lowenstein v. McIntosh*, 37 Barb. 251 ; *Smith v. Sweeney*, 35 N. Y. 291. Where a submission is made by an attorney, if the parties appear and proceed before the arbitrators, they cannot object that the submission was unauthorized. *Diedrick v. Richley*, 2 Hill, 271 ; *Hays v. Hays*, 23 Wend. 363. See *Tillou v. U. S. L. Ins. Co.*, 8 Daly, 84. But in *McPherson v. Cox*, 86 N. Y. 472, the rule was held, Danforth, J., writing the opinion, and all concurring except Earl, J., not voting, that an attorney at law cannot bind his client by a submission to arbitration, and that an agent would not have this power, unless specially authorized by his principal. A board of supervisors may submit a claim to arbitration. *People v. Supervisors*, 24 Hun, 413. And the assent of a corporation to arbitration may be assumed from circumstances, as that all the trustees attended before the arbitrators. *Isaacs v. Beth Hamedrash Society*, 1 Hilt, 469 ; appeal dismissed, 19 N. Y. 584. Executors and administrators have the right to submit to arbitrators disputed claims or demands against the estate they represent ; they come within the statute. *Russell v. Lane*, 1 Barb. 519 ; *Wood v. Tunnickliff*, 74 N. Y. 38. Partners who sign, or assent, are bound ; those who do not sign are not bound. *McBride v. Hagan*, 1 Wend. 326 ; *Harrington v. Higham*, 15 Barb. 524 ; *Harrington v. Higham*, 13 id. 660. The fact that a party is under arrest at time of submission is not such duress as to avoid his agreement to arbitrate. *Shepard v. Watrous*, 3 Caines, 166.

Subject-matter.—The statute is not intended to authorize the submission of matters arising after the agreement. *Matter of Van-*

derveer, 4 Denio, 249. The provision forbidding the submissions of claims in fee or for life to real estate forbids only the submission of controversies relating to the legal title in lands; a claim to an equitable estate in lands may be submitted. *Olcott v. Wood*, 14 N. Y. 32; affirming 15 Barb. 644. But a submission to arbitration of a claim to freehold estate is absolutely void and incapable of ratification. *Wiles v. Peck*, 26 N. Y. 42. A question of boundary may be submitted or a claim for a term of years. *Cox v. Jagger*, 2 Cow. 638; *Robertson v. McNeil*, 12 Wend. 578; *Sloat v. Woodward*, 5 Hun, 340; affirmed, 71 N. Y. 590. Disputes between partners relative to the partnership property or business may be submitted. *Backer v. Fobes*, 20 N. Y. 204. An agreement by which the members of an association agree to confer judicial powers on a body of men as to all controversies which may arise is void, and the courts will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in case of submission of specific matters in controversy. *Austin v. Searing*, 16 N. Y. 112. See 50 id. 250, *supra*. The question as to whether or not real estate belonging to a religious corporation shall be sold cannot be submitted to arbitration, and it is held by the same authority that the questions as to who are the legally elected trustees of a corporation cannot be so submitted. *Wyatt v. Benson*, 23 Barb. 327. A cause of action to set aside a conveyance and establish a lien on the land cannot be submitted to arbitration, it involves an estate in fee. *Keep v. Keep*, 17 Hun, 152. A submission of the question as to how much should be paid for the use of land for a highway was held valid. *Mitchell v. Bush*, 7 Cow. 185. A submission to arbitration of a dispute as to the line between two lots of land may be made by parol. *Ryder v. Dodge*, 14 Week. Dig. 84.

The arbitrators.—The parties may select whomsoever they choose as arbitrators, although if a person be selected who is objectionable for any cause the court will relieve the party in case he acts promptly so soon as he becomes aware of the incompetency. *Mayor, etc., v. Butler*, 1 Barb. 336; *Perry v. Moore*, 1 E. D. Smith, 32. The appointment should be in writing if the submission is under the statute. *Elmendorf v. Harris*, 23 Wend. 628. But in a common-law arbitration an umpire may be appointed by parol. *Elmendorf v. Harris*, 5 Wend. 516.

The submission.—At common law the submission might be by parol. *Valentine v. Valentine*, 2 Barb. Ch. 430; *Diedrick v.*

Richley, 2 Hill, 271, and cases *supra*. But an executory agreement under seal cannot be discharged by a parol arbitration. *French v. New*, 28 N. Y. 147. It is not important what form the submission takes. It is sufficient if it clearly shows intent to arbitrate and abide by the award, but it should be so drawn as that the arbitrators acquire jurisdiction. The powers conferred must be strictly followed. *Pratt v. Hackett*, 6 Johns. 14; *McBride v. Hagan*, 1 Wend. 326; *Butler v. Mayor, etc.*, 7 Hill, 329; *Howard v. Sexton*, 4 Comst. 157. It may be by mutual bonds so drawn as to show the intention of the parties. *Isaacs v. Beth Hamedrash Society*, 1 Hilt. 469; *Brady v. Mayor of Brooklyn*, 1 Barb. 584. It is not necessary that there should be an express agreement to abide by the award, the submission implies such an agreement. *Valentine v. Valentine*, 2 Barb. Ch. 430; *Efner v. Shaw*, 2 Wend. 567. It was held in *French v. New*, 20 Barb. 486, that where a submission was made omitting to authorize judgment to be entered on the award, that it was not a submission under the statute; this case was reversed. 28 N. Y. 147, and *Howard v. Sexton*, 4 Comst. 157, expressly hold a submission valid notwithstanding that it does not contain an agreement that a judgment of a court of record may be entered on the award. If the submission is under the statute, if the parties intend to authorize the arbitrators to award the cost and expenses of the arbitration, the submission should contain such authority in express terms. *Matter of Vanderveer*, 4 Denio, 249; *People v. Newell*, 13 Barb. 86; reversed 3 Seld. 1. But if the subject of the award is a pending action they may determine as to the costs of that suit, and also may award as to fees and expenses of arbitrators. *Matter of Vanderveer*, 4 Denio, 249. Where the submission is of all demands it includes all actions relating and demands which were in existence at the time of the submission. *Selleck v. Adams*, 15 Johns. 197; *Fiedler v. Cooper*, 19 Wend. 285; *Owen v. Boerum*, 23 Barb. 187; *Byers v. Van Deusen*, 5 Wend. 268; *Wheeler v. Van Houten*, 12 Johns. 311. Parol evidence is not admissible to show that any matter was not intended to be submitted. *De Long v. Stanton*, 9 Johns. 38; *Efner v. Shaw*, 2 Wend. 567. Where the submission was by two parties on one side, and one on the other, it was held it included not only the joint demands of the two, but their individual demands against the other party. *Fiedler v. Cooper*, 19 Wend. 285. See *Dater v. Wellington*, 1 Hill, 319. A submission specifying particular questions and adding "divers and other matters," is deemed equivalent to a general submission of all questions. *Munro v.*

Alaire, 2 Caines, 320. Uncertainty as to what is submitted is cured by reference to an instrument attached to the submission and referred to in it. *Winship v. Jewett*, 1 Barb. Ch. 173. A clause submitting "all questions between the parties connected with said partnership" includes every thing necessary to a settlement of its affairs, though there is also an enumeration of special matters. *Locke v. Filley*, 14 Hun, 139.

Effect of arbitration on pending suit.—A submission to arbitration of a pending action and of "all other actions," and of "all other matters in controversy" is a general submission of all questions. *Jones v. Wellwood*, 71 N. Y. 208. The effect of a submission to arbitration of a pending suit is so fully set forth in a late decision that the following extract and citations are given as showing the rule in that respect. It is said in *McNulty v. Solly*, 95 N. Y. 244, "the rule is well settled that mere submission to arbitration is a discontinuance of the suit." "*Camp v. Root*, 18 Johns. 22; *Ex parte Wright*, 6 Cow. 399; *Smith v. Barse*, 2 Hill, 387; *Bank of Monroe v. Widner*, 11 Paige, 529, 533; *Ressequie v. Brownson*, 4 Barb. 541; *Wilson v. Williams*, 66 id. 209; *People v. Onondaga Common Pleas*, 1 Wend. 314.

In *Larkin v. Robbins*, 2 Wend. 505, it was held that this was so, although the arbitrators had not taken or consented to take upon themselves the burden of the submission, or done any act under it. It is sufficient, says Marcy, J., "that the parties have selected these arbitrators, and concluded their agreement to submit to them. It is this agreement which withdraws the cause from the court and effects a discontinuance of the suit." The submission is *eo acto*, a discontinuance, *Ressequie v. Brownson*, *supra*, and such would be its effect although it had been immediately revoked. *Smith v. Barse*, *supra*. The ground upon which the doctrine rests is that the parties have selected another tribunal—one of their own creation—to settle the controversy, and they thereby agree to and do withdraw the cause from the court. In *Buel v. Dewey*, 22 How. Pr. 342, the rule is said to apply, although the arbitrators fail or refuse to take upon themselves the duty of the submission. There is no injustice in this rule. It was in the power of the parties either to ascertain beforehand whether the persons named would accept the office of arbitrators, or to so qualify their agreement as to make it conditional on their acceptance, or that proceedings in the suit should only be stayed until an award is made, or no longer than a specified time, and then cease to be of effect unless an award was made.

But neither of these things was done, and we think the general law was properly applied by the court below, and that the defendant was entitled to the relief sought by motion. *Wells v. Lain*, 15 Wend. 99; *Coleman v. Wade*, 2 Seld. 44. Cases are cited by the learned counsel for the appellant from the courts of other States, *Elliot v. Quimby*, 13 N. H. 183; *Chapman v. Seccomb*, 36 Me. 103, to the effect that the assent of the arbitrators is a condition precedent to the taking effect of the agreement for submission. But in this State the rule to the contrary seems to be too firmly established to be disturbed; and when the submission, as in this case, is the voluntary act of the parties, in words chosen by themselves, the court is not at liberty to add any thing which requires their consent, or look beyond the paper to discover their intent. The legal effect of the contract, as we have seen, was to discontinue the action and put it out of court, and to that the parties must be deemed to have assented. This result follows, although the submission was not acknowledged or certified, as prescribed in section 2366 of the Code. Its validity does not depend upon the provisions of the statute, but upon the common law, and section 2386 expressly provides that, except in certain cases, of which this is not one, the title of the Code concerning arbitrations does not affect a submission made otherwise than as prescribed therein, or any proceedings taken pursuant thereto." To the same effect is *Larkin v. Robbins*, 2 Wend. 505; *Wells v. Lain*, 15 id. 99; *Grosvenor v. Hunt*, 11 How. 355; *Baldwin v. Barrett*, 4 Hun, 119; *Van Slyke v. Lettice*, 6 Hill, 610; *Blunt v. Whitney*, 3 Sandf. 4. This is true even though the award is void. *Jordan v. Hyatt*, 3 Barb. 275; *Keep v. Keep*, 17 Hun, 152. Where there was provision for a stay, that was operative till an award was made which acted as a discontinuance. *Jacoby v. Johnston*, 1 Hun, 242. A stipulation to refer an action not referable is not an arbitration. *Es parte Wright*, 6 Cow. 399; *Harris v. Bradshaw*, 18 Johns. 26. Agreements to submit a pending controversy were, under the circumstances, held arbitrations in *Dodge v. Waterbury*, 8 Cow. 136; *Merritt v. Thompson*, 27 N. Y. 225. An agreement to arbitrate not carried out does not bar a suit on the cause intended to be submitted. *Haggart v. Morgan*, 4 Sandf. 198; affirmed, 6 N. Y. 422; *Buel v. Dewey*, 22 How. 342.

Rights and duties of parties.—A submission of a dispute arising on a building contract, though not conforming to the mode prescribed by the contract, is sufficient to bind the parties by the award. The appearance by one of the parties as a witness is sufficient to

show he assented to the submission. *White v. Mathews*, 14 Week. Dig. 67.

Under an arbitration clause in a policy of insurance, it is the duty of the parties to the contract to act in good faith to accomplish the appraisement in the way provided; and if either acts in bad faith, so as to defeat the real object of the clause, the other is absolved from compliance therewith, and so when one arbitration fails, from default of one of the parties, the other is not bound to enter into a new arbitration agreement. *Uhlig v. Williamsburgh City Fire Insurance Company*, 101 N. Y. 362. A party to a building contract may waive a stipulation therein that the final payment to be made by him shall not be required unless the architect shall certify that the contract has been fully performed to his satisfaction; an acceptance of the building as under a completed contract is such a waiver and entitles the contractor to recover the sum due, although no certificate has been given, and although the architect is not satisfied. *Smith v. Alker*, 102 N. Y. 87. Under a provision in a building contract, that should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by an arbitrator named, and his decision shall be final and conclusive, notice of submission to the arbitrator by one party need not be given to the other when no dispute as to items or values is to be determined, but merely the construction of the specifications. *Gustavson v. McGay*, 12 Daly, 423; citing *McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 463. But where, after submission to arbitrators, they disagree, and an umpire is chosen, the parties are entitled to notice and opportunity to be heard before the umpire and his associates, and an award made without such notice is invalid. *Linde v. Republic Fire Ins. Co.*, 50 N. Y. Super. 362. On dismissal of an action to enjoin two arbitrators chosen by a landlord and tenant, pursuant to a covenant in a lease to renew the same at a rent to be fixed by the arbitrators, from appointing an umpire as provided in the lease, it was held that it is not the province of a court of equity to direct arbitrators how they shall decide a case pending before them. *Livingston v. Sage*, 95 N. Y. 289. When a fire insurance policy provided that in case of loss and failure of the parties to agree on the amount of damage, the question should be referred to two appraisers, one selected by each party, and if they disagreed, they should choose an umpire, and the award of any two should be binding, and the appraisers disagreed, it was held that a determination of the amount

of damage by arbitration, as provided, was a condition precedent, and that it was the duty of the insured to offer to select new appraisers before he could maintain an action on the policy. *Davenport v. Long Island Ins. Co.*, 15 Week. Dig. 62. Where an arbitrator determines the question submitted to him without hearing a party or appointing a time for a hearing, the decision is not binding on the party, and he may prove his claim anew. *Moran v. Bogert*, 16 Abb. (N. S.) 303.

Form of Submission.

In the Matter of the Arbitration between Alexander Palmer and John Constable.

WHEREAS, Differences do now and for a long time have existed between Alexander Palmer and John Constable, both of the city of Albany, in relation to divers subjects of controversy and dispute, and which might respectively be the subjects of an action:

Now, therefore, the undersigned, said Alexander Palmer and John Constable, do hereby mutually covenant and agree to and with each other to submit all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever now pending, existing or held by and between the said parties, to John V. V. Kenyon, George Keeler and John G. Gray, as arbitrators, who, or any two of them, shall arbitrate, award, order, judge and determine of and concerning the same.

The said arbitrators may select or appoint an additional arbitrator or umpire, by appointment in writing. And we do mutually covenant and agree to and with each other that the said award to be made by the said arbitrators, or any two of them, shall, in all things, by us and each of us, be well and faithfully kept and observed; provided, however, that the said award shall be made in writing under the hands of the said arbitrators, or any two of them, and duly acknowledged or proved and certified, as required by law, and filed in the county clerk's office of Albany county, or delivered to the said parties in difference, or either of them, or his attorney, on the 12th day of December, 1886.

And we further agree that a judgment of a court of record, to-wit, the Supreme Court in the county of Albany, shall be rendered upon the award made pursuant to this submission, as provided by section 2366 of the Code of Civil Procedure.

Witness our hands, this 15th day of November, 1886.

(Witnessed and acknowledged.)

(Signatures.)

Precedent for Arbitration Bond.

Know all men by these presents, that I, Alexander Palmer, of the town of Rosendale, county of Ulster, N. Y., am held and firmly bound unto John Constable, of the town of Wawarsing, said county, in the sum of \$500, lawful money of the United States of America, to be

paid the said John Constable, his executors, administrators or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal and dated the 20th day of November, 1886.

The condition of this obligation is such, that if the above-bounden Alexander Palmer shall well and truly submit to the decision of John V. V. Kenyon, John G. Gray and George B. Keeler, named, selected and chosen arbitrators, as well by and on the part of the said Alexander Palmer as of the said John Constable, between whom the controversy exists, to hear all the proofs and allegations of the parties of and concerning any and all matters relating thereto. But before proceeding to take any testimony therein the said arbitrators shall be sworn "faithfully and fairly to hear and examine the matters in controversy between the parties to these presents, and to make a just award according to the best of their ability and understanding," so as the award of the said arbitrators, be made in writing, subscribed by them, or any two of them, and attested by a subscribing witness, ready to be delivered to the said parties on or before the 10th day of March, 1887, then the above obligation to be void.

And it is hereby mutually agreed by and between the parties to these presents, that judgment shall be entered upon the award which may be made pursuant to the submission, in the Supreme Court, to the end that all matters in controversy in that behalf between the said parties shall be finally settled and concluded, pursuant to the provisions of the statute for determining controversies by arbitration.

(Add acknowledgment.)

(Signatures.) [L.S.]

§ 2367. Where a submission is made as prescribed in this title, an additional arbitrator or an umpire cannot be selected or appointed unless the submission expressly so provides. Where a submission, made either as prescribed in this title or otherwise, provides that two or more arbitrators therein designated, may select or appoint a person as an additional arbitrator or as an umpire, the selection or appointment must be in writing. An additional arbitrator or umpire must sit with the original arbitrators upon the hearing. If testimony has been taken before his selection or appointment, the matter must be reheard, unless a rehearing is waived in the submission, or by the subsequent written consent of the parties or their attorneys.

The umpire may be appointed immediately by the arbitrators without waiting until the disagreement has arisen between them. *Butler v. Mayor*, 1 Hill, 489; *Mayor v. Butler*, 1 Barb. 325; *Van Cortlandt v. Underhill*, 2 Johns. 339; S. C. below, 17 id. 405; *McKinstry v. Solomons*, 2 id. 56; 13 id. 26. The appointment should be in writing. *Elmendorf v. Harris*, 23 Wend. 628. In case the additional person acts with the arbitrators to hear and determine the matters in controversy (as is now provided by statute, *supra*), the proceedings are henceforth to be conducted the same in all respects as if he had been appointed in the first instance with the other arbitrators. *Lyon v. Blossom*, 4 Duer, 318. The failure of the umpire to take the oath does not render the award void, but it

may be waived. In case there is no waiver the Supreme Court may set aside the award on application, and an action on the award setting up the irregularity is in the nature of an application to the equitable power of the court and is sufficient to present the question. Where, by the terms of a submission, two arbitrators are appointed, with authority, in case of a disagreement, to appoint a third, the decision of any two of them to be final in case of such disagreement and appointment, a rehearing is necessary, and unless this right is expressly and unequivocally waived a decision and award, without a rehearing upon notice to the losing party at the time appointed therefor, is not binding and cannot be enforced. *Day v. Hammond*, 57 N. Y. 479, and cases cited under section 2366. In *Matter of Martin*, 1 How. (N. S.) 28, it is held that an agreement in writing between the parties waiving the oath of arbitrators and of the umpire is to be construed with the submission, and to supply the omission from the submission of any provision for the appointment of an umpire; and the rule in *Brown v. Lyddy*, 11 Hun, 451, that a waiver of the right to adduce evidence before the arbitrators is not a waiver of the right to do so before the umpire, if the appointment of an umpire be thought necessary, is applied. The umpire, when called upon to act, is in general invested with the same power as the arbitrators and bound by the same rules and has to perform the same duties.

§ 2368. Subject to the terms of the submission, if any are specified therein, the arbitrators, selected as prescribed in this title, must appoint a time and place for the hearing of the matters submitted to them; and must cause notice thereof to be given to each of the parties. They, or a majority of them, may adjourn the hearing, from time to time, upon the application of either party, for good cause shown, or upon their own motion; but not beyond the day fixed in the submission for rendering their award, unless the time so fixed is extended by the written consent of the parties to the submission, or their attorneys.

The arbitrators may fix the time and place of hearing, but the parties must have an opportunity to be heard, unless the stipulation provides to the contrary. *Morewood v. Jewett*, 2 Robt. 496. An award, made without notice to a party of hearing, is void. *Jordan v. Hyatt*, 3 Barb. 275; *Moran v. Bogert*, 3 Hun, 603; *Knowlton v. Mickles*, 29 Barb. 465; *Peters v. Newkirk*, 6 Cow. 103. The party seeking to impeach the award must show lack of notice. *Mayor v. Butler*, 1 Barb. 325. Under the Revised Statutes the provisions regulating the mode of procedure were held to apply not only where the written submission contained an agreement that judgment might be entered, but generally to all written submissions.

Bulson v. Lohnes, 29 N. Y. 291. But reference must be had to section 2386 in this connection, which has since been enacted; a similar enactment, however, existed in the statute. The notice of hearing and the production of evidence may be waived by the parties, and this waiver may be gathered from the circumstances of the case. It is no objection to the award of an arbitrator that he did not hear the parties or take their evidence when it appears that they waived a hearing, and that it was intended the arbitrator should decide the matter submitted upon his personal knowledge and inspection. *Wilberly v. Matthews*, 11 Week. Dig. 471; affirmed, 91 N. Y. 648. It is a good defense to an action upon an award to show that the arbitrators proceeded without notice to the defendant, and that they made the award in suit before defendant closed his proofs. *Garvey v. Carey*, 35 How. 282. The arbitrators must take the usual means to ascertain values, and the parties are entitled to be heard and produce witnesses unless the privilege is waived. They are entitled to notice of appointment of an umpire, and an opportunity to be heard by him, and a waiver of this privilege as to the original two does not extend to the umpire. *Brown v. Lyddy*, 11 Hun, 451. And submission which provides that the party found indebted should pay by a certain day implies a limitation that the award must be made by that day, and subsequent proceedings are void unless the time is extended in writing. *People v. Townsend*, 5 How. 315. But the time for making an award under a sealed submission at common law may be extended by parol, and if the parties proceed without objection, after time has expired, they will be deemed to have waived the stipulation as to time. *Wood v. Tunnickliff*, 74 N. Y. 88.

Precedent for Appointment of Time and Place of Hearing, and Notice to Parties.

Alexander Constable
and
John Palmer.

In arbitration.

TO ALEXANDER CONSTABLE and JOHN PALMER:

You are hereby notified that the undersigned, arbitrators appointed pursuant to an agreement between you, dated the 20th day of November, 1886, hereby appoint the 1st day of December, 1886, at ten o'clock in the forenoon, as the time, and the office of J. W. Bentley, in the city of Albany, as the place for the hearing of the matters so

submitted to them, and that they will attend at such time and place for the purpose of such hearing.

Dated November 21, 1886.

Yours, etc.

JOHN V. V. KENTON,
JOHN G. GREY,
GEORGE G. KEELER.
Arbitrators.

Form of Notice.

In the Matter of the Arbitration between Alexander Palmer and John Constable.

SIR—Take notice that the above matter will be brought to a hearing before the arbitrators appointed therein, at the office of James W. Bentley, in the city of Albany, on the 1st day of December, 1886, at 10 o'clock in the forenoon pursuant to an order made by them, fixing such time and place for said hearing.

ALEXANDER PALMER.

To JOHN CONSTABLE.

§ 2369. Before hearing any testimony, arbitrators selected either as prescribed in this title or otherwise must be sworn, by an officer designated in section eight hundred and forty-two of this act, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding; unless the oath is waived, by the written consent of the parties to the submission, or their attorneys.

The omission to take the oath does not invalidate the proceedings, whether under the statute or at common law. *Browning v. Wheeler*, 24 Wend. 258; *Howard v. Sexton*, 4 Comst. 157; *Winship v. Jewett*, 1 Barb. Ch. 173. But it is an irregularity, and if not waived may be taken advantage of to set aside the award. *Day v. Hammond*, 57 N. Y. 479. It is a waiver if both parties are present and proceed to trial without a request to have the arbitrators sworn. *Kelsey v. Darrow*, 22 Hun, 125; *Cutler v. Cutler*, 48 N. Y. Super. 470.

Form of Oath.

You and each of you do swear that you will faithfully and fairly hear and examine the matters in controversy submitted to you, as arbitrators, by and between Alexander Palmer, on the one part, and John Constable, of the other part, and a just award thereon make according to the best of your understanding.

§ 2370. The arbitrators, selected either as prescribed in this title, or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers, with respect to all the proceedings before them, which are conferred, by the provisions of title second of chapter ninth of this act, upon a board, or a member of a board, authorized by law to hear testimony.

§ 2371. All the arbitrators, selected as prescribed in this title, must meet together, and hear all the allegations and proofs of the parties; but an award by a majority of them is valid, unless the concurrence of all is expressly required in the submission. Unless it is otherwise expressly provided in the submission, the award may require the payment, by either party, of the arbitrators' fees, not exceeding the fees allowed to a like number of referees in the Supreme Court; and also their expenses.

Under the Revised Statutes it was held two had power to hear and act in case all three were notified, and one refused to act. *Crofoot v. Allen*, 2 Wend. 494. But see language of the section where all heard the proofs, as to who may decide. *Shultz v. Halsey*, 3 Sandf. 405. And it might be shown *aliunde* the record that all heard the proofs. *Oakley v. Finch*, 7 Cow. 290. It is not necessary all should concur in the decision of every question which arises. *Campbell v. Western*, 3 Paige, 124. It is no ground for setting aside award that arbitrators have received incompetent evidence. *Viele v. Troy & Boston R. R. Co.*, 21 Barb. 382. If one of the parties to an arbitration refuses to appoint an arbitrator, the arbitrator appointed by the other party cannot act. *Holliday v. Marshall*, 7 Johns. 211. A submission provided that the decision of a "majority" should be binding, and the bond provided for decision "by said arbitrators;" held an award by two was valid. *Isaacs v. Beth Hamedrash Society*, 1 Hilt. 469. On a submission to two who were to choose a third, if they could not agree, which they did, an award signed by two only is valid. *Batley v. Button*, 13 Johns. 186. An award signed by three, as to only two of whom there was a subscribing witness, held good. *Ott v. Schroepfel*, 4 Barb. 250. See *Jackson v. Meritt*, 11 Abb. 370; *Schulz v. Halsey*, 3 Sandf. 405; *Haff v. Blossom*, 5 Bosw. 559; *Whitlock v. Duffield*, Hoff. 110, for decisions based on peculiar facts in each case. An award is in the nature of a judicial act, and void if made on Sunday. *Story v. Elliott*, 8 Cow. 27. It is not necessary that an award should show on its face that all met and heard the matters in controversy, but that may be shown by parol. *Ackley v. Finch*, 7 Cow. 290; *Schulz v. Halsey*, 3 Sandf. 405. Nor need it show on its face that the parties had notice of the hearing. *Butler v. Mayor*, 1 Barb. 325. The fact that the submission is under seal does not make it necessary that the award should be under seal. It is only necessary when the submission requires it. *Owen v. Boerum*, 23 Barb. 187. Since the passage of the Code there is no statute in force which empowers a majority of the arbitrators appointed by private persons to make a valid award, unless the submission is in

writing, subscribed by the parties and duly acknowledged or proved and certified as a deed is required to be for the purpose of being recorded. *Lorenzo v. Deery*, 26 Hun, 447. If arbitrators decline to act, they are no longer arbitrators, and an award made by them is void. Parol evidence is admissible to show that before making their award they resigned, and their resignations were accepted. *Relyea v. Ramsey*, 2 Wend. 602. An award ready to be delivered on payment of fees sufficiently complies with a provision in the submission that the award must be delivered by a certain day. *Ott v. Schroepfel*, 3 Barb. 56. And delivery may be waived. *Perkins v. Wing*, 10 Johns. 143; *Burnap v. Losey*, 1 Lans. 111; *Buck v. Wadsworth*, 1 Hill, 321. Where the arbitrators' bond requires the award to be executed ready for delivery to the parties, it requires the award to be executed in duplicate, so that each party may have one. Either party may waive this, and if he consents to take a copy, leaving the original with the opposite party, the award is valid though but one is executed. *Gidley v. Gidley*, 65 N. Y. 169. If arbitrators make a void award, their appointment becomes null, because, having expressed an opinion, they are no longer impartial. *Mayor v. Butler*, 1 Barb. 325. The arbitrators declared the amount due the claimant, and that he should pay their costs. Afterward they met again and made a new award, declaring the same amount to be due, but as to costs, simply stating the amount, making no direction as to payment. In an action on the second award it was held that they had no power to make it, and that the testimony of the arbitrators was inadmissible to show that they did not intend to award costs against the claimant; the first award exhausted their powers. *Doke v. James*, 4 N. Y. 567.

Where an award is void for uncertainty, it cannot be helped by a second one that is void, because the arbitrators can make only one. *Fallon v. Kelehar*, 16 Hun, 266. The award should embrace nothing but the matters submitted; if otherwise, it is void. *Pratt v. Hackett*, 6 Johns. 14; *Butler v. Mayor*, 7 Hill, 329. But in case the portion so in excess of the submission can be separated from the rest, it may be treated as surplusage, and the award should stand as to matters submitted. *Cox v. Jagger*, 2 Cow. 638; *McBride v. Hagan*, 1 Wend. 326; *Gomez v. Garr*, 6 id. 583; *Martin v. Williams*, 13 Johns. 264; *Harrington v. Higham*, 15 Barb. 524. An award cannot require one not a party to do an act, if so it is void as to all, unless the unauthorized portion can be separated. *Masten v. Williams*, *supra* Arbitrators are presumed to have

acted upon all matters which were contained in the submission. *Emery v. Hitchcock*, 12 Wend. 156. But in case the award does not embrace all the matters within the submission brought before the arbitrators it is void. *Wright v. Wright*, 5 Cow. 197; *Moore v. Cockcroft*, 4 Duer, 133. But it is not an objection that a particular matter contained in the submission was not laid before the arbitrators. The parties are bound to claim all they desire before the arbitrators. *Owen v. Boerum*, 23 Barb. 188; *Ott v. Schroepfel*, 1 Seld. 486. The award settles and quiets all matters fairly within the meaning and intent of the submission. The award acts as a judgment. *Lowenstein v. McIntosh*, 37 Barb. 251. It does not invalidate an award because it does not dispose of certain personal property belonging to a firm, the disposition of which was submitted to arbitrators on the hearing. This was upon the ground that such disposition was not required by the submission. *Backus v. Forbes*, 20 N. Y. 204. The penalty of the bond is only regarded in case of revocation. Where the submission is revoked, in ascertaining the amount to be awarded, the arbitrators are not limited to that sum. *Ex parte Wallis*, 7 Cow. 522. It is held that the necessary incident of an arbitration is the awarding of costs. *Strang v. Ferguson*, 14 Johns. 161; *Nichols v. Rens. Co. Mutual Ins. Co.*, 22 Wend. 125; *Cox v. Jagger*, 2 Cow. 638. And to the contrary see *Trustees of Amsterdam v. Vanderveer*, 4 Denio, 249; *People v. Newell*, 18 Barb. 86; *Akeley v. Akeley*, 17 How. 21. But if the subject of the controversy is an action then pending in court, the arbitration may award as to the costs of the action without express authority, and also as to fees and expenses of arbitrators. *Matter of Vanderveer*, 4 Denio, 251. An award in a matter submitted to arbitration while a suit was pending on an appeal from a judgment of a justice of the peace that plaintiff recover \$25 and the costs, if any recovery before such justice, gives only such costs as are then owing and unpaid. *Willey v. Shaver*, 4 Hun, 797.

Effect of award. — A valid award has the binding effect of a judgment as between the parties, and is a bar to a suit for the original cause of action. *Shephard v. Watson*, 3 Caines, 166; *Wheeler v. Van Houten*, 12 Johns. 311; *Fidler v. Cooper*, 19 Wend. 285; *Wells v. Lain*, 15 id. 99; *Diedrick v. Richley*, 2 Hill, 272; *Wilberly v. Matthews*, 91 N. Y. 698; *Lowenstein v. McIntosh*, 37 Barb. 251; *Coleman v. Wade*, 6 N. Y. 44. Even though the award has not been performed. *Brazill v. Isham*, 12 N. Y. 9. When the submission is general of all demands which either party

has against the other, the award is a bar to any demand existing at the time of the submission, and evidence to show that the demand for which the action was brought was omitted by mistake is admissible. *Wheeler v. Van Houten*, 12 Johns. 311. See *Taylor v. Remington*, 51 N. Y. 663. Although the terms of a submission may be sufficiently broad to render a particular claim the proper subject of trial, yet if the award does not on its face appear to include any adjudication thereon, evidence is admissible to show that proof of such claim was not heard, but was in fact excluded by the arbitrators, and the award will not conclude the parties with respect to such claim. *Morse v. Osborn*, 64 Barb. 543. Although an award cannot operate as a conveyance of land, it is effectual by way of preventing a party from disputing title. *Cox v. Jagger*, 2 Cow. 638. Upon the strength of an award upon a question of boundary, the party in whose favor it is, may recover in ejectment. *Robertson v. McNeil*, 12 Wend. 578; *Sellick v. Adams*, 15 Johns. 197. An award on a legatee's claim against an executor before the surrogate, held binding on the accounting. *Valentine v. Valentine*, 2 Barb. Ch. 430. An award made against the estate of a deceased person under a submission made by his personal representatives, ascertains and liquidates the claim, but gives no priority of payment over other creditors, nor does an award of payment absolutely have that effect, though it may bind the representatives personally. *Wood v. Tunnicliff*, 74 N. Y. 38. An award must be pleaded to be a defense and cannot be shown under a general denial. *Brazill v. Isham*, 12 N. Y. 9.

§ 2372. To entitle the award to be enforced, as prescribed in this title, it must be in writing; and, within the time limited in the submission, if any, subscribed by the arbitrators making it, acknowledged or proved, and certified, in like manner as a deed to be recorded; and either filed in the office of the clerk of the court, in which, by the submission, judgment is authorized to be entered upon the award, or delivered to one of the parties, or his attorney.

Form of Award.

In the Matter of the Arbitration between Alexander Palmer and John Constable.

To all to whom these presents shall come or may concern :

We, John V. V. Kenyon, George Keeler, and John G. Gray, to whom was submitted as arbitrators, the matters in controversy existing between Alexander Palmer and John Constable, as by the condition of the submission executed by the said parties respectively, and

dated the 10th day of November, 1886, more fully appears: Now, therefore, know ye, that we, the arbitrators mentioned in the said submission, having heard the proofs and allegations of the respective parties, and examined the matters in controversy, by them submitted therein, do, therefore, make this award in writing, that is to say, the said, etc. (here give findings in detail).

In witness whereof, we have hereunto subscribed these presents this 5th day of December, in the year 1886.

(Add acknowledgment.)

JOHN V. V. KENYON,
JOHN G. GRAY,
GEORGE KEELER,
Arbitrators.

§ 2873. At any time within one year after the award is made, as prescribed in the last section, any party to the submission may apply to the court, specified in the submission, for an order confirming the award; and thereupon the court must grant such an order, unless the award is vacated, modified or corrected, as prescribed in the next two sections. Notice of the motion must be served upon the adverse party to the submission, or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the Supreme Court the motion must be made within the judicial district embracing the county where the judgment is to be entered.

It was held in *Hughes v. Bywater*, 4 Hill, 551, that where a bond of submission to arbitrators contained a stipulation that in case the award was not paid or fulfilled, judgment for the penalty of the bond might be forthwith entered in the Supreme Court; the prevailing party was at liberty to perfect judgment immediately, but this is questioned in *Goodsell v. Phillips*, 49 Barb. 353. As to the entry of judgment on an award under arbitration, not under the statute, see *Bank of Monroe v. Widner*, 11 Paige, 529; *Merritt v. Thompson*, 27 N. Y. 225. A mistake in an award may be corrected by an action in equity, notwithstanding the award was made under an arbitration providing that judgment might be entered on the award under the statute. The power of the court to correct or modify the award within a limited time is not exclusive, but the Supreme Court possesses the original equitable jurisdiction.

Form of Notice of Motion.

Alexander Palmer
and
John Constable.

} *In arbitration.*

To JOHN CONSTABLE and CARROLL WHITAKER, Esq., *his Attorney*:

Take notice, that an application will be made to the Supreme Court, at a Special Term thereof, to be held at the court-house, in the city of Kingston, on the 26th day of December, 1886, for an order confirming the award of the arbitrators herein in the above-entitled mat-

ter, which award is dated December 5, 1886, and for judgment thereupon and in accordance therewith, with costs, and for such other or further relief as may be proper.

That said application will be made upon said award and upon other papers served. Yours etc.,

ALEXANDER PALMER,
S. B. SHARPE, *Attorney for Alex. Palmer.*

§ 2874. In either of the following cases the court specified in the submission must make an order vacating the award upon the application of either party to the submission.

1. Where the award was procured by corruption, fraud or other undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of the party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject-matter submitted was not made.

Where an award is vacated and the time within which the submission requires the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

§ 2875. In either of the following cases the court specified in the submission must make an order modifying or correcting the award upon the application of either party to the submission:

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award.
2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted.
3. Where the award is imperfect in a matter of form, not affecting the merits of the controversy, and, if it had been a referee's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award so as to effect the intent thereof, and promote justice between the parties.

On application to vacate an award, the court may go behind the award and inquire as to what took place before the arbitrators. *Matter of Williams*, 4 Denio, 194; *Butler v. Mayor*, 7 Hill, 329. But the arbitrators cannot give evidence for the purpose of impeaching the award or to contradict it. *Mayor v. Butler*, 1 Barb. 325; *French v. New*, 20 id. 481; *Campbell v. Western*, 3 Paige, 124; *Harrington v. Hamblin*, 12 Wend. 212. But they may give evidence to show that they did not consider a particular matter, or that matters were contained in the award not in the submission. *Morris v. Osborn*, 64 Barb. 543; *Mayor v. Butler*, 1 id. 325; *Briggs v. Smith*, 20 id. 409.

The rule that arbitrators cannot give evidence to impeach the award does not apply where an umpire has been chosen. 1 Barb.

325, *supra*. Nor does it apply to an arbitrator who has not signed an award made by the majority of the arbitrators. *Arbitration of National Bank v. Darragh*, 17 Week. Dig. 290. Unless restricted by the submission, arbitrators may disregard strict rules of law and evidence and decide according to their sense of equity. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392. Awards are to be liberally construed for the purpose of upholding them. *Jackson v. Ambler*, 14 Johns. 96; *Fudickar v. Ins. Co.*, 62 N. Y. 392.

When award will be vacated.—An award may be set aside for partiality or corruption of the arbitrators. *Smith v. Cutler*, 10 Wend. 590; *Ennist v. Hoyt*, 17 id. 410. But in order to justify a court in interfering on this ground, the facts should be clearly shown. *Wood v. A. & R. R.*, 8 N. Y. 168; *Perkins v. Giles*, 50 id. 228. Or if the parties have not had an opportunity to be heard before the arbitrators. *Jordan v. Hyatt*, 3 Barb. 275. The misconduct and misbehavior which under the statute authorize vacating an award must be acts which evince unfairness and not merely error of judgment, no matter however great. *Smith v. Cutler*, 10 Wend. 590; *Ketcham v. Woodruff*, 24 Barb. 147; *Perkins v. Giles*, 50 N. Y. 228; *De Castro v. Brett*, 56 How. 484. The court will not set aside an arbitration where the arbitrators have erred only in regard to a question of law or fact. *Jackson v. Ambler*, 14 Johns. 96; *Campbell v. Western*, 3 Paige, 124; *Winship v. Jewett*, 1 Barb. Ch. 173; *Ketcham v. Woodruff*, 24 Barb. 147; *Emmett v. Hoyt*, 17 Wend. 410. Where the award is within the limit of the submission and there is no evidence of fraud, courts will not ordinarily interfere with the determination. *Matter of Roosevelt v. Nichols*, 6 Week. Dig. 437. An award will not be set aside for error either of law or fact relating to matters within the jurisdiction of the arbitrators. There must be either misconduct, or corruption, or a mistake, or a clerical error, and in general this must appear on the face of the award or in some paper delivered with it. *Morris Run Coal Co. v. Salt Co. of Onondaga*, 58 N. Y. 667. No objection can be made which does not involve corruption or misconduct on the part of the arbitrators or an award not within the submission. *Merritt v. Thompson*, 27 N. Y. 225; *Herrick v. Blair*, 1 Johns. Ch. 101; *Shepard v. Merrill*, 2 id. 276; *Todd v. Barlow*, id. 551; *Perkins v. Wing*, 10 Johns. 142; *Matter of Roosevelt v. Nichols*, 6 Week. Dig. 437. It is not competent at law to show that the arbitrators made mistakes, and a voluntary promise by a party to correct any errors does not open the award in that respect. *Efner*

v. *Shaw*, 2 Wend. 567. And it is no ground of objection in an action to enforce a common-law submission that it is against law, *Mitchell v. Bush*, 7 Cow. 185; *Cranston v. Kenny*, 9 Johns. 212. Although if a mistake is made in ascertaining the amount due it is a good defense to an action on an award, a general allegation that the arbitrators "made a mistake in such computation, which mistake was a clerical error and that the award was the result of such clerical error" is sufficient. *Garvey v. Carey*, 35 How. 282. If special matters are submitted the award is not void because it directs a general release since it will inure only to the matter submitted. *Munro v. Alaire*, 2 Caines, 320. Where a party has with full knowledge accepted and executed an award it should not be set aside. *De Castro v. Brett*, 56 How. 484. In *Fudickar v. Guardian Mutual Life Insurance Co.*, 45 How. 462; 37 N. Y. Super. 358; affirmed, 62 N. Y. 392, it is held that where all the proofs and proceedings before the arbitrator are not put in evidence in an action to set aside the award, the court will presume that the facts necessary to sustain his rulings were established before him. The general rule that the court will not interfere with an award except for fraud, corruption, partiality, or misconduct on the part of the arbitrator, or excessive or imperfect use of the powers conferred, or of gross mistake as to which there can be no controversy, is reiterated with the qualifications that the rule does not apply, where the arbitrator by statements in the award or opinion of his intention to be governed by strictly legal rules has conferred upon the court a power of inquiry and revision. See, also, *De Castro v. Brett*, 56 How. 484. In *Halstead v. Seaman*, 82 N. Y. 27, some of the rules applicable to awards are stated to be that the refusal of an arbitrator to hear testimony which is pertinent and material is sufficient misconduct to authorize the setting aside of his award, though he may think he has sufficient other evidence. The construction by arbitrators of the submission to them is not conclusive, it is for the court to determine whether they have exceeded their powers or refused to exercise them. The general rule that the decisions of arbitrators on the mere ground that they are erroneous are not reviewable applies only to matters submitted to them. The case of *Fudickar v. The Guardian Mut. Ins. Co.*, 62 N. Y. 392, is cited with approval. That case holds among other things, that any violation of material justice, such as receiving material evidence from one party without the knowledge or consent of the other, should be condemned. The two cases give very fully the principles now applied

by the courts to the review of awards made by arbitrators, and the earlier cases of *Herrick v. Blair*, 1 Johns. Ch. 101; *Campbell v. Western*, 3 Paige, 124; *Dater v. Wellington*, 1 Hill, 319, and *Turnbull v. Martin*, 37 How. 20, must be read in the light of these later decisions. See, also, *Van Cortlandt v. Underhill*, 17 Johns. 405. But an award cannot be impeached collaterally by showing that the arbitrators erred in receiving evidence *Viele v. T. & B. R. R. Co.*, 21 Barb. 381; affirmed on another point, 20 N. Y. 184. On a motion to vacate an award on the ground that improper evidence has been received the question is, whether such evidence has been received which, by any probability, may have affected the conclusion of the arbitrators, and not whether such evidence was considered by them in making their award. If the evidence was received it is impossible for the court to say that it did not affect the conclusion of the arbitrators. *Arbitration National Bank v. Daragh*, 17 Week. Dig. 290.

What conduct of arbitrators affects award.—Where an arbitrator had before his selection examined the property he was to appraise, and expressed an opinion as to its value, and the award was clearly excessive, it was held to show partiality and misconduct. *Smith v. Cooly*, 5 Daly, 401. But the fact that previous to the arbitration one of the arbitrators consulted with defendant, and told him the claim was too high, does not show such partiality, corruption or gross misbehavior as to invalidate the award. *French v. New*, 20 Barb. 481; reversed on another point, 28 N. Y. 147. An award cannot be objected to on the ground that the arbitrator did not hear the evidence, if it appears that the parties waived a hearing, and expected and intended that he should make his decision upon his personal knowledge. *Wiberly v. Matthews*, 91 N. Y. 648. Nor does the fact that the plaintiff communicated with his proposed arbitrator with reference to the controversy avoid the award, although the amount awarded is large. *Wood v. A. & R. R. R. Co.*, 8 N. Y. 160.

Award must be within submission.—The fact that the arbitrators took into consideration matters not submitted to them is admissible in an action on an award, and if they did so, and the court cannot distinguish so as not to affect the justice of the case, the whole award is void. *Briggs v. Smith*, 20 Barb. 409; *Butler v. Mayor*, 7 Hill, 329; S. C., 1 Barb. 325; *Discock v. Harris*, 74 N. Y. 109. If an arbitrator exceeds his authority it is immaterial whether it is done consciously or by mistake. *Borrowe v. Milbank*, 6 Duer,

680. But there is a presumption that the arbitrators have acted within the submission till the contrary appears, *Solomons v. McKinstry*, 13 Johns. 27; *Pierce v. Morrison*, 6 Hun, 235; and even though the terms of an award are less comprehensive than the submission, the award is good unless it appears that the matters submitted were brought before the arbitrators which are not embraced in the award. *Ott v. Schroepfel*, 5 N. Y. 482. An entire award is not necessarily to be rejected because in some respects in excess of the submission, or invalid under the statute, if the objectionable parts can be separated. *Locke v. Filley*, 14 Hun, 139; *Martin v. Williams*, 13 Johns. 264; *Cox v. Jagger*, 2 Cow. 638; *Jackson v. Ambler*, 14 Johns. 96; *Doke v. James*, 4 N. Y. 567; *Keep v. Keep*, 17 Hun, 152; *Harrison v. Higham*, 15 Barb. 524; *Bacon v. Wilbur*, 1 Cow. 117. Otherwise, if the parts are dependent. *Schuyler v. Vanderveer*, 2 Caines, 235; *Jones v. Wellwood*, 71 N. Y. 208. Where an award is void in one particular, and that is the only act which the party is directed to do, and is the consideration intended for the act required of the other party, the whole is void. *Brown v. Hankerson*, 3 Cow. 70.

Award must be certain.—An award must be certain and definite, so as to show what each party is required to do; if it is sufficiently certain to be obligatory as a contract it is valid, and if the several parts are consistent, and their meaning plain, the award will be upheld. *Schuyler v. Vanderveer*, 2 Caines, 235; *Perkins v. Giles*, 50 N. Y. 228; *Pierson v. Van Marter*, 17 Week. Dig. 183. An award is sufficiently certain though it requires a calculation, if the basis for the calculation is given. *Ludlow v. Grozart*, 3 Johns. Cas. 534. As in an award that defendant pay a certain sum, and each party pay his own witness' fees. *Weed v. Ellis*, 3 Caines, 253. If the submission fixes the time of payment, an award fixing the amount is sufficient. *Gomez v. Garr*, 6 Wend. 583; reversed on another point, 9 id. 549.

On a submission of partnership matters an award requiring one partner to pay the partnership debts is sufficiently certain. *Case v. Ferris*, 2 Hill. 75. And where a pending action is referred to arbitrators, an award for a sum and costs to which he has been subjected is sufficiently certain. *Boughton v. Seamans*, 9 Hun, 392. So an award on a boundary question is sufficient if it shows enough to enable each party to decide if his possession corresponds with the line. *Bacon v. Wilbert*, 1 Cow. 117. As an instance of sufficient award see *Cutler v. Cutler*, 48 N. Y. Super. 470. An other-

wise indefinite award may be cured by the recital. *Wood v. A. & R. R. Co.*, 8 N. Y. 160; *Butler v. Mayor*, 7 Hill, 329; *Mayor v. Butler*, 1 Barb. 325. An award incomplete on its face may be supplemented by parol evidence, and the rule requiring an award to be certain only requires that the meaning of the parties can be ascertained when all the evidence is before the court. When a portion of an award is void for uncertainty, it does not vitiate the residue if, by striking out the defective portion, a substantial, definite and unobjectionable award remains. *Becker v. Bowen*, 61 N. Y. 317. An award that a contractor is entitled to his full bill, after deducting the bills paid him by persons named, is void for uncertainty. *Fallon v. Kelehar*, 16 Hun, 266. To same effect, *Wait v. Barry*, 12 Wend. 377. It is said, in *Hiscock v. Harris*, 74 N. Y. 109, that there are certain fundamental requisites and properties which awards must possess; among other things they must be within the submission, certain and to a common intent and final. They must be within the submission, because to no other subjects or questions than to those embraced therein does their authority extend; they must be certain, that parties may know their rights and obligations, and they must be final, that the parties may not be remitted to a new controversy. The award in question in that action is then held to be void, among other things, for uncertainty.

Award must be final. — Where there is a submission of all questions, and an intent appears to have every thing decided, if any thing is decided, an award deciding part only is void. An award that all causes of action were merged in and discharged by a contract, and ordering judgment and dismissing the complaint, but concluding that it is not intended to determine the rights of either of said parties under the contract, is not final and definite and should be set aside. *Jones v. Wellwood*, 71 N. Y. 208. It would be fatal to the award if any portion of the matters in dispute submitted to the arbitrator should be found not to have been decided by him, although the question whether an award is invalid does not depend on any absolute rule of law requiring the determination of all the matters submitted to give validity to an award, but upon the terms of the submission. *Merritt v. Thompson*, 27 N. Y. 225.

The reservation, by arbitrators, of a power over the thing submitted shows the award not to be final, and with this fundamental defect in an award it is void, and parties have a right to insist upon a legal objection. *Hiscock v. Harris*, 74 N. Y. 109. But this cannot be shown *dehors* the record. *Todd v. Barlow*, 2 Johns. Ch.

551. But an award by arbitrators who are empowered to determine the disposition of partnership property in payment of partnership debts is not void because it does not dispose of all the assets, unless the submission expressly provides that it must do so. It is valid as to all assets of which it disposes, and the others remain, as before, the joint property of the partners. *Backus v. Fobes*, 20 N. Y. 204. While all matters submitted must be embraced in the award, it will be presumed this is done, but if the contrary appears award is void. *Wright v. Wright*, 5 Cow. 197; *Moore v. Cockcroft*, 4 Duer, 133. An award which leaves nothing to be done, except some ministerial act, as selecting from a designated stock, is final. *Owen v. Boerum*, 23 Barb. 187. An award of payment of a specific sum stated that the party had a just claim to it, or more if insisted upon. It was held that the award was final, though no release was directed, and it was to be intended that the claimant consented to the reduction of the sum. *Solomons v. McKinstry*, 13 Johns. 27.

Awards sustained or vacated.—An award requiring a release by a married woman, who was not strictly a party to the arbitration, is good if the release is tendered. *Smith v. Sweeney*, 35 N. Y. 291. Where the submission of the question of boundary disclosed that the arbitrators were to be governed by an original tier line, it was held that the conclusion of the arbitrators as to where that line was was conclusive. *Robertson v. McNeil*, 12 Wend. 578. Where the arbitrators awarded damages for slander the defendant cannot resist payment on the ground the words were not actionable. *Shepherd v. Watrous*, 3 Caines, 166. See *French v. New*, 20 Barb. 481; reversed on another point, 28 N. Y. 147. Where arbitrators opened an account stated, the award was sustained. *Emmet v. Hoyt*, 17 Wend. 410.

If a verdict would not be set aside on same facts, an award will be sustained. *Wood v. A. & R. R. Co.*, 8 N. Y. 160. And an award will not be opened on the subsequent discovery of a receipt. *Todd v. Barlow*, 2 Johns. Ch. 551. In *Dater v. Wellington*, 1 Hill, 319, under a submission by partners as one party to a controversy, an award against one of them was sustained. Under submission of a claim against an insurance company, the arbitrators besides awarding a sum provided that the claimant should assign his claim to another company, *held*, within the powers of the arbitrators. *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. 125. But an award requiring a party to do an act which it does not appear the party can control, is void to that extent. *Martin v. Williams*,

13 Johns. 264. As is an award that a sum claimed from a third party is invalid and not a bar to an action. *Brazill v. Isham*, 1 E. D. Smith, 437; affirmed on other grounds, 12 N. Y. 9. A verbal award is not valid unless a verbal submission of the matters on which it is made would be binding. The fact that one of the parties by consenting to a verbal award prevented the arbitrators from making a valid award, will not deprive him of the right to show the invalidity of the one made. *French v. New*, 28 N. Y. 147. A court of equity will correct a mistake in an award of arbitrators and decree a performance. *Bouck v. Wilber*, 4 Johns. Ch. 405.

Form of Order upon Motion Confirming Award.

At a Special Term held at the City Hall, in the city of Albany, on the 10th day of January, 1887:
Present — Hon. S. L. Mayhem, *Justice*.

(*Title.*)

On reading and filing the award made by the arbitrators (naming them) in the above matter, dated the 5th day of December, 1885, by which it appears that, etc., (state substance of award) with proof of due service upon John Constable, of notice of this application, together with a copy of said award, and upon motion of S. B. Sharpe, counsel for said Alexander Palmer, after hearing Carroll Whitaker, Esq., counsel for John Constable, opposed, and on reading (name any opposing papers): It is hereby ordered that the said award be, and the same is hereby confirmed, and that the said Alexander Palmer have judgment against the said John Constable, for the relief therein specified, and for the fees and expenses of the said arbitrators, as therein mentioned, and \$25 costs of this application, and of the proceedings subsequent hereto, and his disbursements therefor to be taxed.

S. L. MAYHEM,
Justice Supreme Court.

§ 2376. Notice of a motion to vacate, modify, or correct an award, must be served upon the adverse party to the submission, or his attorney, within three months after the award is filed or delivered, as prescribed by law for service of notice of a motion upon an attorney in an action. For the purposes of the motion, any judge, who might make an order to stay the proceedings, in an action brought in the same court, may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Form for Notice of Motion to Vacate or Modify, etc., the Award.

(*Title.*)

To S. B. SHARPE, attorney for ALEXANDER PALMER:

Take notice that an application will be made to the Supreme Court, at a Special Term thereof, to be held at the court-house, in the city of Hudson, on the 5th day of January, 1886, for an order vacating

(modifying or correcting), in the following particulars: (stating them) the award of the arbitrators made herein, dated December 5, 1885, with costs, and for such other or further relief as may be proper.

That such application will be made upon the said award, and upon the affidavits and papers, with copies of which you are herewith served.

Yours, etc.,

CARROLL WHITAKER,

Attorney for John Constable.

Order for Stay.

To ALEXANDER PALMER:

On the within papers, let all proceedings on the part of Alexander Palmer, to enforce the said award, be stayed until the hearing and determination of the within noticed motion.

Dated December 26, 1885.

W. L. LEARNED,

Justice Supreme Court.

§ 2377. Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements, may be awarded to the prevailing party; and the payment thereof may be enforced, in like manner as the payment of costs upon a motion in an action.

Order Vacating Award.

At a term of the Supreme Court, held in and for the State of New York, at the court-house in the city of Hudson, on the 5th day of January, 1886:

Present — Hon. Samuel Edwards.

(Title.)

On reading and filing notice of motion, that the award made herein by the arbitrators heretofore selected, dated the 5th day of December, 1885, be vacated, modified or corrected, and on motion of C. Whitaker, counsel for John Constable, and after hearing S. B. Sharpe, attorney for Alexander Palmer, and on reading (name opposing papers): It is hereby ordered that the said award be, and the same is hereby vacated with \$25 costs and disbursements, to be taxed to be paid by the said Alexander Palmer to the said John Constable.

SAMUEL EDWARDS,

Justice Supreme Court.

§ 2378. Upon the granting of an order, confirming, modifying, or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this title. Costs of the application, and of the proceedings subsequent thereto, not exceeding twenty-five dollars and disbursements, may be awarded by the court, in its discretion. If awarded, the amount thereof must be included in the judgment.

The fact that the court has confirmed an award presents no obstacle to enjoining proceedings under it, if the award was of a matter which is not the subject of arbitration. *Wyatt v. Benson*, 23 Barb. 327. An action upon an award on a submission under the statute may be brought in the Supreme Court, although the submission provides for judgment in the County Court. If defendant desires to

move that court for relief he may obtain a stay of proceedings. The statute is cumulative merely, not exclusive, and the right of action on the award still remains. *Burnside v. Whitney*, 21 N. Y. 148.

§ 2379. Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:

1. The submission; the selection or appointment, if any, of an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award.

2. The award.

3. Each notice, affidavit, or other paper, used upon an application to confirm, modify, or correct the award, and a copy of each order of the court, upon such an application.

4. A copy of the judgment.

The judgment may be docketed, as if it was rendered in an action.

§ 2380. The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

§ 2381. An appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action. The proceedings upon such an appeal, including the judgment thereupon, and the enforcement of the judgment, are governed by the provisions of chapter twelfth of this act, as far as they are applicable.

It was held under the statute that on reviewing an order refusing to vacate an award and giving judgment thereon, the appellate court will not consider questions not raised in the court below. *Hollenbeck v. Fleming*, 6 Hill, 303. Also that the party aggrieved could, on appeal, review only the errors specifically pointed out by statute. *Dibble v. Camp*, 60 Barb. 150; *Ketcham v. Woodruff*, 24 id. 147; *Wilson v. Wilson*, 66 id. 209.

§ 2382. The death of a party to a submission, made either as prescribed in this title or otherwise, or the appointment of a committee of the person or property of such a party, as prescribed in title sixth of this chapter, operates as a revocation of the submission, if it occurs before the award is filed or delivered; but not afterward. Where a party dies afterward, if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party, is appointed, after the award is filed or delivered, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property; but not otherwise. In a case specified in this section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award, must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

See *Harris v. Hiscock*, 91 N. Y. 340; reversing 14 Week. Dig. 219, as to effect of death of one of parties and of arbitrators.

§ 2383. A submission to arbitration, made either as prescribed in this title or otherwise, cannot be revoked by either party, after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision. A revocation, when allowed, must be made by an instrument in writing, signed by the revoking party, or his authorized agent, and delivered to the arbitrators, or one of them; and it is not necessary, in any case, that the instrument of revocation should be under seal. Any party to a submission may thus revoke it; whether he is a sole party to the controversy, or one of two or more parties on the same side.

This section is intended, as is said by the revisers, to abolish the rule laid down in *Van Antwerp v. Stewart*, 8 Johns. 125, and in *Robertson v. McNeil*, 12 Wend. 578; also to settle a conflict of authority in *Bloomer v. Sherman*, 5 Paige, 575; *Bank of Monroe v. Widner*, 11 id. 529, and *French v. New*, 20 Barb. 481, in accordance with the two former decisions. A revocation on condition is none the less a revocation, if effectual to take away the arbitrator's right to proceed. *Crofoot v. Allen*, 2 Wend. 494.

§ 2384. Where a party expressly revokes a submission, made either as prescribed in this title or otherwise, any other party to the submission may maintain an action against him, and also against his sureties, if any, upon the submission, or any instrument collateral thereto, in which action the plaintiff may recover all the costs and other expenses, and all the damages, which he has incurred in preparing for the arbitration, and in conducting the proceedings to the time of the revocation. Either of the arbitrators may recover, in an action against the revoking party, his reasonable fees and expenses.

§ 2385. A sum, penalty, forfeiture, or damages, shall not be recovered for a revocation of a submission to arbitration, made either as prescribed in this title or otherwise, except as prescribed in the last section; notwithstanding any stipulated damages, penalty, or forfeiture, expressed in the submission, or in any instrument collateral thereto.

§ 2386. This title does not affect any right of action, in affirmance, disaffirmance, or for the modification of a submission, made either as prescribed in this title or otherwise, or upon an instrument collateral thereto, or upon an award made or purporting to be made in pursuance thereof. And, except as otherwise expressly prescribed therein, this title does not affect a submission, made otherwise than as prescribed therein, or any proceedings taken pursuant to such a submission, or any instrument collateral thereto.

CHAPTER XXI.

PROCEEDINGS TO FORECLOSE A MORTGAGE BY ADVERTISEMENT.

-Under the Code of Procedure proceedings to foreclose a mortgage by advertisement were not included in the special proceedings provided for, and the matter was one treated exclusively by the Revised Statutes and acts amendatory thereof, and supplementary thereto, of which there were a considerable number. All of these provisions are now merged in the present title. A history of the proceedings to foreclose by advertisement in this State is given by Judge Andrews in *Mowry v. Sanborn*, 68 N. Y. 153. The same case is reported in 65 N. Y. 581, and 72 id. 534; also 7 Hun, 380; 62 Barb. 223; 11 Hun, 545. The remedy is solely and exclusively the creature of the statute, and hence all of the statutory requirements must be strictly complied with, and a failure so to do renders the proceedings void. *Van Slyke v. Sheldon*, 9 Barb. 278; *King v. Dantz*, 11 id. 191; *Cohoes v. Goss*, 13 id. 137; *Cole v. Moffit*, 20 id. 18; *St. John v. Bumpstead*, 17 id. 100; *Low v. Purdy*, 2 Lans. 422. This method of foreclosure is usually resorted to by reason of its economy as compared with foreclosure by action in cases where the mortgaged premises are not of sufficient value to bear the expenses of a sale in addition to the amount due. The principal objections are the fact that the proceedings are very strictly construed, and hence an error is fatal to the title, and that the writ of assistance does not issue to put the purchaser in possession as in an action. The remedy by summary proceedings has, however, been so adapted to obtaining possession by purchaser after sale, that this is of comparatively little weight, but the fact that no amendment can be made to the proceedings, together with the inadequacy of the costs allowed, have great weight with the profession, and it will be rarely used where there is sufficient property to pay all of the expenses of suit.

§ 2387. A mortgage upon real property, situated within the State, containing therein a power to the mortgagee, or any other person, to sell the mortgaged property, upon default being made in a condition of the mortgage, may be foreclosed, in the manner prescribed in this title, where the following requisites concur:

1. Default has been made in a condition of the mortgage, whereby the power to sell has become operative.
2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof; or, if such an action has been brought, it has been discon-

tinued, or final judgment has been rendered therein against the plaintiff, or an execution issued upon a judgment rendered therein in favor of the plaintiff, has been returned wholly or partly unsatisfied.

3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.

The statutes of this State regulating the foreclosure of mortgages by advertisement do not apply to mortgages on real estate without the State. *Elliott v. Wood*, 45 N. Y. 71. But where a mortgage was executed upon lands without the State, authorizing a sale after certain specified notices in this State, it was held that, in the absence of any statutory regulation, the parties had the power to agree upon the manner of sale; that while the statutes of this State in reference to the sale of mortgaged premises had reference only to real estate in this State, yet there being no proof that the sale provided for was illegal according to the laws of the State where the land was situated, there was no ground for equitable interference. *Carpenter v. Black Hawk Co.*, 65 N. Y. 43; *Central G. M. Co. v. Platt*, 3 Daly, 263. It is said in *Ferguson v. Kimball*, 3 Barb. Ch. 616, that a mortgage given to secure unliquidated damages cannot be foreclosed under the statute. In *Mowry v. Sanborn*, 68 N. Y. 153, the question is suggested but not passed upon. Mr. Moak in his able argument in that case cites upon the point, *Ferguson v. Ferguson*, 2 N. Y. 360; *People, ex rel., v. Potter*, 47 id. 375. See *Lockwood v. Turner*, 7 Wend. 458.

If a mortgage has already been foreclosed as to part and the decree provides for subsequent default, sale cannot be made under the statute. *Cox v. Wheeler*, 7 Paige, 250. See *Grosvenor v. Day*, Clarke's Ch. 109. As to how payment of a mortgage affects the power of sale, see *Cameron v. Erwin*, 5 Hill, 272; *Warner v. Blake-man*, 36 Barb. 501; S. C. affirmed 4 Keyes, 487. Under the statute it was necessary, before a mortgage could be foreclosed by advertisement, that it should be duly recorded in the proper county. *Wells v. Wells*, 47 Barb. 416. A tender to the mortgagee or his assignee of the whole amount of the debt and interest, with the costs and charges, will render a subsequent sale on the mortgage irregular and void. *Burnet v. Denniston*, 5 Johns. Ch. 35. But the mortgage is not extinguished where the assignee takes a quit-claim deed of one-half of the mortgaged premises; at most this can only operate as an extinguishment of a portion of the mortgage debt, leaving the assignee at liberty to foreclose for the residue. *Klock v. Cronkhite*, 1 Hill, 107. The foreclosure must be made in the name of the real party in interest. *Cohoes Co. v. Goss*, 13 Barb. 137; *Slee v. Manhattan*

Co., 1 Paige, 48. See *Wilson v. Troup*, 2 Cow. 195. A surviving executor may foreclose by statute. *Demarest v. Wynkoop*, 3 Johns. Ch. 129. Also a foreign executor or administrator. *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Averill v. Taylor*, 5 How. 476.

§ 2888. The person entitled to execute the power of sale must give notice, in the following manner, that the mortgage will be foreclosed by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice.

1. A copy of the notice must be published at least once in each of the twelve weeks immediately preceding the day of sale, in a newspaper published in the county wherein the property to be sold, or a part thereof, is situated.

2. A copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building where the County Court of each county wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place at or near the entrance of the building nearest to the property; or, in the city and county of New York, in a like place at or near the entrance of the building where the Court of Common Pleas for that city and county is directed by law to be held.

3. A copy of the notice must be delivered at least eighty-four days before the day of sale, to the clerk of each county wherein the mortgaged property, or any part thereof, is situated.

4. A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator. A copy of the notice may also be served, in like manner, upon a subsequent grantee or mortgagee of the property whose conveyance was recorded in the proper office for recording it in the county, at the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee, whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgage; or upon any person then having a lien upon the property, subsequent to the mortgage, by virtue of a judgment or decree duly docketed in the county clerk's office and constituting a specific or general lien upon the property.

The notice specified in this section must be prescribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

It is sufficient if the notice is published once in each week for twelve weeks successively, although all the publications are made within seventy-eight days, provided the first is eighty-four days prior to the date of sale, excluding the day on which the sale is made. *Howard v. Hatch*, 29 Barb. 297; *Cole v. Moffitt*, 20 id. 148; *Anonymous*, 1 Wend. 90. But the first publication must be at least eighty-four days before the day of sale, one day being excluded and the other included. *Bunce v. Reed*, 16 Barb. 347. It has been held that where the original notice of sale was defective, a republication with the several notices of postponement for the required twelve weeks was a substantial compliance with the statute. *Cole v. Moffitt*, 20 Barb. 18. A notice of sale, as filed in the

clerk's office and published for the first four weeks, was, by mistake, dated April 23, 1858, instead of 1868; *held*, that the mistake was obvious on inspection and could not have misled, and did not invalidate the proceedings. *Mowry v. Sanborn*, 68 N. Y. 153.

The validity of the sale is not affected by the fact that the paper in which notice was published was not calculated to give general information. *Wake v. Hart*, 12 How. 444; *Jencks v. Alexander*, 11 Paige, 624. It is only required that the notice should be affixed to the door of the building where County Courts are held; it is not necessary the person affixing it should afterward see it there. *Merritt v. Bowen*, 7 Cow. 13; *Hornby v. Cramer*, 12 How. 490. Where the land lies in several counties the notice must be posted in each county, and a copy delivered to the clerk of each county. *Wells v. Wells*, 47 Barb. 416. If service of notice is not made upon a party entitled thereto his claim is not barred or foreclosed, or his rights affected by the sale, and the assignee of a subsequent incumbrance stands in place of the original owner; actual notice of sale is insufficient. *Root v. Wheeler*, 12 Abb. 294; *Dwight v. Phillips*, 48 Barb. 116; *Winston v. McCall*, 32 id. 241; *Wetmore v. Roberts*, 10 How. 51; *Mowry v. Sanborn*, 65 N. Y. 581. See *Mickles v. Dillaye*, 15 Hun, 296. And personal representatives of a deceased mortgagor must be served. *Cole v. Moffit*, 20 Barb. 18; *St. John v. Bumpstead*, 17 id. 100. But his heirs or devisees need not be; his wife must if she join in the mortgage. *Anderson v. Austin*, 34 Barb. 319; *Low v. Purdy*, 2 Lans. 422; *King v. Duntz*, 11 Barb. 191. Service on the wife of the mortgagor, if there is no personal representative, is not a valid service. *Mackenzie v. Alster*, 64 How. 388. The wife of a grantee of premises already mortgaged for the purchase-money should be served with notice in order to cut off her inchoate right of dower. *Northrup v. Wheeler*, 43 How. 122. But an omission to serve her will not affect the validity of the sale as to other property served, and a subsequent incumbrancer is cut off by such a sale. *Hubbell v. Sibley*, 5 Lans. 51; affirmed, 50 N. Y. 468. Where the statute required notice to be served not only on those subsequent grantees and mortgagees "whose conveyances were on record at the time of the first publication of the notice," but is required to be served upon all persons having a lien by or under a judgment, the lien of a judgment perfected after publication of the first notice, and before sale, is not cut off. *Groff v. Morehouse*, 51 N. Y. 503. But as to the present statute see section

2395, subdivision 4, which is intended to obviate this difficulty. On the foreclosure by advertisement, only those mortgagees or assignees whose mortgages or assignments are recorded are entitled to notice. *Decker v. Boice*, 19 Hun, 152; affirmed, 83 N. Y. 215. The provisions of the statute as to publication, posting and service, must all be complied with, or the proceeding will be void. *Van Slyke v. Sheldon*, 9 Barb. 278; *King v. Duntz*, 11 id. 191; *Stanton v. Kline*, 16 id. 9; *Cole v. Moffit*, 20 Barb. 18. In computing the time for the publication, posting and service of notices, the first day is to be excluded and the last included. *Westgate v. Handlin*, 7 How. 372; *Hornby v. Cramer*, 12 id. 493; *Bunce v. Reed*, 16 Barb. 347.

§ 2389. Service of notice of sale as prescribed in subdivision four of the last section must be made as follows:

1. Upon the mortgagor, his wife, widow, executor or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow, by delivering a copy of the notice as prescribed in article first of title first of chapter fifth of this act, for delivery of a copy of the summons in order to make personal service thereof upon the person to be served, or by leaving such a copy, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion, at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a natural person, he, or his wife, widow, executor or administrator, or a subsequent grantee of the property whose conveyance is upon record, or his wife or widow, is not a resident of or within the State, then service thereof may be made upon them in like manner, without the State, at least twenty-eight days prior to the day of sale.

2. Upon any other person, either in the same method, or by depositing a copy of the notice in the post-office, properly inclosed in a postpaid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.

Where the affidavits on file showed service on the mortgagor by mail, at a particular place of residence, *held* that the omission was fatal, and could not be supplied by an amendment on the trial which involved the validity of the foreclosure. The court cannot supply omissions or remedy defects in the proceedings. *Dwight v. Phillips*, 48 Barb. 116. See contra, *Bunce v. Reed*, 16 id. 347. And where it was attempted to serve notice by mail upon the mortgagor, but the notice was by mistake addressed to her at a place other than her residence, the sale was held void. *Robinson v. Ryan*, 25 N. Y. 320. It does not invalidate the sale if the notice is properly directed to an administratrix, simply omitting her title as such. *George v. Arthur*, 2 Hun, 406. Notice may be served on the mortgagor by mail by depositing it in any post-office in the State. *Bunce v. Reed*, 16 Barb. 347. In case of service by mail the time is counted from the deposit of the letter, not from the date of the postmark or the time

of forwarding. *Hornby v. Crane*, 12 How. 490. In foreclosing a mortgage by advertisement it is not requisite that personal service of notice of sale should be made, though the parties live in the same town with the party foreclosing or his attorney. In such case it is a compliance with the statute if copies of the notices are deposited in the post-office at the place where the parties reside, properly directed. *Stanton v. Kline*, 11 N. Y. 196. If the mortgagor be dead notice must be served on the executor or administrator, and one must be appointed to have valid foreclosure. *Mackenzie v. Alster*, 64 How. 388. See to same effect, *Van Schaack v. Sanders*, 32 Hun, 515, both citing a large number of cases.

§ 2390. A county clerk, to whom a copy of a notice of sale is delivered as prescribed in subdivision third of the last section but one, must forthwith affix it in a book, kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice to the name of the mortgagor.

§ 2391. The notice of sale must specify:

1. The names of the mortgagor, of the mortgagee, and of each assignee of the mortgage.
2. The date of the mortgage, and the time when, and the place where, it is recorded.
3. The sum claimed to be due upon the mortgage, at the time of the first publication of the notice; and, if any sum secured by the mortgage is not then due, the amount to become due thereupon.
4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.

If the notice of sale does not state the place of sale, the equity of redemption will not be barred. *Burnet v. Denniston*, 5 Johns. Ch. 35. Notice for sale at the "City Hall" is sufficient. *Hornby v. Cramer*, 12 How. 490. Where the name of the mortgagee was omitted from the description of the mortgage contained in the notice of sale but was subscribed to the notice, the requirements of the statute were held to be substantially complied with, and so if it sufficiently refers to the record in the clerk's office. *Candee v. Burke*, 1 Hun, 546. It is not necessary to state in the notice of sale fully the authority by virtue of which the subscribers foreclose. *People v. Prescott*, 3 Hun, 419. It has been held that where the notice of sale was for Sunday, the mortgagee might before the day postpone to another day and make a valid sale under the notice. *Westgate v. Handlin*, 7 How. 372. Where the notice of sale stated the premises were to be sold under three mortgages instead of two, it was held to be irregular and void. *Burnet v. Denniston*, 5 Johns. Ch. 35. But this is not so as to a mistake, a cor-

rection of which is published with the notice before it can be presumed to have influenced persons desiring to bid as where, by mistake, the notice of sale stated a prior incumbrance upon the mortgaged property at twice its actual amount, but a correction was published with the notice two weeks before the sale. *Hubbell v. Sibley*, 5 Lans. 51; affirmed, 50 N. Y. 468. See *Bunce v. Reed*, 16 Barb. 347. It is said that claiming more than the amount actually due does not vitiate where no fraud is shown. *Mowry v. Sanborn*, 62 Barb. 223; reversed on another point, 65 N. Y. 581. See S. C., 68 id. 153; 72 id. 534. But a foreclosure is void if the description in the notice does not conform substantially to that in the mortgage. *Rathbone v. Clark*, 9 Abb. 66, *n*. The notice sufficiently specifies where the mortgage is recorded by stating the clerk's book and date of record though the number of the book is erroneously given. It is, however, essential that the notice should state that the mortgage will be foreclosed by sale. A mere notice of sale, without declaring it to be for purposes of foreclosure or in execution of the power of sale contained in the mortgage, is insufficient. *Judd v. O'Brien*, 21 N. Y. 186. A sale subject to payment of future installments without specifying the amount of such installments in the notice of sale is void. *Jenks v. Alexander*, 11 Paige, 619. Stating in the notice the amount due on the day before publication is not fatal. It is surplusage to state that the premises are subject to a lease, and the omission to state how long the lease mentioned in a notice has to run does not affect the sale. *Hubbell v. Sibley*, 5 Lans. 51; affirmed, 50 N. Y. 468. Under a statutory foreclosure it is lawful to sell the property free and clear of all incumbrances. It is not essential that such terms should be included in the published notice of foreclosure. The affidavits required by statute are not conclusive as to the facts when the premises are purchased by the owner of the mortgage, and where the terms of sale are not stated therein, oral evidence is admissible to prove them. *Story v. Hamilton*, 86 N. Y. 428. To the point that the affidavits are not conclusive and may be controverted, the court cites *Mowry v. Sanborn*, 72 N. Y. 534; S. C., 68 id. 160.

Precedent for Notice of Foreclosure.

WHEREAS, Default has been made in the payment of the money secured by a certain mortgage, bearing date the 29th day of January, 1883, made and executed by Joseph Reil, Jr., of the town of Hardenburgh, Ulster county, New York, as mortgagor to John Q. Adams, of Clarryville, Sullivan county, New York, which said mortgage was

given as collateral security for the payment of a portion of the purchase-money of the premises described in said mortgage, and was duly recorded in the Ulster county clerk's office, in book No. 166 of mortgages, page 61, on the 2d day of August, 1883, at one hour and thirty minutes, P. M., and no suit or proceeding having been begun or instituted at law to recover the debt secured by said mortgage, or any part thereof; and,

WHEREAS, Said mortgage was duly assigned by John Q. Adams, said mortgagee in said mortgage, to Cornelius Van Brunt, of the city of New York, which said assignment was dated April 30, 1886, and recorded in Ulster county clerk's office, April 30, 1886, book of mortgages 178, page 345; and,

WHEREAS, The amount claimed to be due on the said mortgage, at the first publication of this notice, is the sum of \$2,210.89, namely, \$2,150 principal, and \$60.89 interest, and that the whole amount remaining unpaid is the sum of \$2,210.89:

Now, therefore, notice is hereby given according to statute in such case made and provided, that by virtue of the power of sale contained in said mortgage, duly recorded therewith as aforesaid, the said mortgage will be foreclosed by a sale of the premises herein described by the subscriber, the mortgage assignee therein, at public auction, on the 11th day of March, 1887, at twelve o'clock noon of that day, at the front door of the court-house, in the city of Kingston, Ulster county, N. Y.

The following is a description of the mortgaged premises, so as aforesaid to be sold, as they are contained in the said mortgage. (Here insert description.)

The above mortgaged premises will be sold free and clear from incumbrances, and subject to the condition of the said mortgage.

Dated at KINGSTON, December 14, 1887.

V. B. VAN WAGONEN,

CORNELIUS VAN BRUNT,

Assignee's Attorney.

Mortgage Assignee.

§ 2892. The sale may be postponed from time to time. In that case a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed.

It is unnecessary to give personal notice of postponement of sale, publication is all that is necessary, and it is said that a postponement from Sunday is sufficient. *Westgate v. Hundlin*, 7 How. 372. The practice is to appear and adjourn the sale. Where public notice was given of postponement, and the sale afterward made on the original date fixed for sale, it was held void. *Jackson v. Clark*, 7 Johns. 225. And so held where, on the day appointed for the sale, an adjournment was announced for a specified time to those present, but a notice subsequently published was for a different day. *Miller v. Hull*, 4 Denio, 104.

Form of Notice of Postponement.

The sale above noticed is hereby postponed to the 25th day of March, 1887, at the same time and place mentioned in the foregoing notice.

Dated *March 11, 1887.*

V. B. VAN WAGONEN,

Attorney for Assignee.

CORNELIUS VAN BRUNT,

Assignee of Mortgagee.

§ 2393. The sale must be at public auction, in the day-time, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the State, the sale may be made at the Capitol. If the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts or lots, shall be sold as it is necessary to sell in order to satisfy the amount due at the time of the sale and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.

It was held in *Lamerson v. Murvin*, 8 Barb. 9, that when lands were mortgaged as one undivided lot or parcel, and are subsequently subdivided, that the mortgagee is not bound to sell in parcels, and the same rule is followed in *Hubbell v. Sibley*, 5 Lans. 51; *Ellsworth v. Lockwood*, 9 Hun, 548. Where the premises do not consist of distinct farms, parcels or lots, they need not be sold separately. *Holden v. Gilbert*, 7 Paige, 211; *Hadley v. Chapin*, 11 id. 248; *Bunce v. Reed*, 16 Barb. 350; *Anderson v. Austin*, 34 id. 319. The case of *Ellsworth v. Lockwood*, 42 N. Y. 89, holds that equity will relieve against a sale in gross of property mortgaged in one tract where a prior incumbrancer offers to bid the whole amount due for one parcel, which could have been sold separately. On subsequent appeal in same case to General Term, 9 Hun, 548, the case is distinguished, and the general principle reiterated, that it is not necessary where division has taken place since the mortgage. As to the effect of a sale of premises subject to installments, see *Cox v. Wheeler*, 7 Paige, 250; *Jencks v. Alexander*, 11 id. 626.

§ 2394. The mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.

If the mortgagee purchases on a sale for an installment his mortgage is merged, but if a third person purchases, the mortgagor if compelled to pay the balance of the debt by a suit on the bond, can have a reassignment of the mortgage, to enable him to secure repayment out of the land. *Cox v. Wheeler*, 7 Paige, 248. The sale may be made by the mortgagee or owner of the mortgage, and he may him-

self become the purchaser and make the affidavit which stands in place of the conveyance. *Hubbell v. Sibley*, 5 Lans. 51.

§ 2395. A sale, made and conducted as prescribed in this title, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption upon, or with respect to, the property sold, of each of the following persons:

1. The mortgagor, his heir, devisee, executor or administrator.
2. Each person, claiming under any of them, by virtue of a title, or of a lien, by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served, as prescribed in this title.
3. Each person, so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office, at the time of the first publication of the notice of sale; and the executor, administrator, or assignee of such a person.
4. Every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions of this section.
5. The wife or widow of a mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this title, where the lien of the mortgage was superior to her contingent or vested right of dower, or in her estate in dower.

It is the policy of the statute that foreclosures and sales should in cases free from fraud or gross irregularity be held final and conclusive. *Jackson v. Henry*, 10 Johns. 195; *Doolittle v. Lewis*, 7 Johns. Ch. 50; *Slee v. Manhattan Co.*, 1 Paige, 70; *Vroom v. Ditmas*, 4 id. 531; *Wilson v. Troup*, 2 Cow. 195. But in order to cut off the rights of the mortgagor and of subsequent purchasers and incumbrancers, the requirements of the statute must be substantially complied with, and what is a substantial compliance is to be determined with regard to its objects. These objects being to relieve parties from the expense of a suit and to enable persons not learned in law to conduct the foreclosure, the construction of the statute should be liberal and not technical. *Jackson v. Henry*, 10 Johns. 195; *Vroom v. Ditmas*, 4 Paige, 526; *Hubbell v. Sibley*,⁶ 5 Lans. 51. A regular foreclosure bars the claim of the mortgagor to all persons having liens subsequent to the mortgage. *Hornby v. Cramer*, 4 How. 490. A sale during the life of the mortgagor, under a power of sale in a purchase-money mortgage, bars the inchoate right of dower of the wife of such mortgagor who was not a party to the instrument. *Brackett v. Baum*, 50 N. Y. 8. And the omission to make the wife of the mortgagor a party, she having joined in the mortgage, merely leaves her the right of redemption, it does not render the foreclosure invalid as to the other parties properly served. *Candee v. Burke*, 1

Hun, 546. But the claim of a person not served is not barred, even though he had actual notice of the sale. *Root v. Wheeler*, 12 Abb. 294; *Van Slyke v. Selden*, 9 Barb. 284; *King v. Duntz*, 11 id. 193; *Stanton v. Kline*, 16 id. 9; *St. John v. Bumpstead*, 17 id. 100; *Cole v. Moffitt*, 20 id. 18; *Wetmore v. Roberts*, 10 How. 51. But a purchaser at a sale which is void for want of notice will be regarded as assignee of the mortgage. *Robinson v. Ryan*, 25 N. Y. 320. In case the mortgage is usurious, the sale does not convey a good title except to a *bona fide* purchaser at the sale. *Jackson v. Dominick*, 14 Johns. 435; *Bissell v. Kellogg*, 60 Barb. 617; affirmed, 65 N. Y. 432; *Hyland v. Stafford*, 10 Barb. 558; *Dix v. Van Wyck*, 2 Hill, 523. Even a *bona fide* purchaser at a sale under a paid mortgage acquires no title. But will be protected by the court where notice has been given the mortgagor. *Cameron v. Erwin*, 5 Hill, 272; *Warner v. Blakeman*, 36 Barb. 501. And a sale under the power after a tender of the amount due by a subsequent lienor of the amount of the debt and interest is void where the purchaser has notice of that fact. *Burnet v. Dennison*, 5 Johns. Ch. 35. The interest of a tenant under a demise from the mortgagor made subsequent to the mortgage is extinguished by the sale. *Simers v. Saltus*, 3 Denio, 214. In such case a mortgagee who has acquired the actual possession of the premises is entitled to the crops sown by the lessee and growing on the land at the time of sale, and the same rule holds good as to fixtures. *Lane v. King*, 8 Wend. 584; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Shepherd v. Philbrick*, 2 Denio, 176; *Gillett v. Balcom*, 6 Barb. 370; *Gardner v. Finley*, 19 id. 317. Courts of equity regard a mortgagee in the execution of the power of sale contained in the mortgage by statutory foreclosure as a trustee executing a power in trust, and bound to conduct the proceedings fairly and in good faith. Relief will be given by suit to set aside such proceedings in case of fraud or bad faith, upon much the same grounds as are sufficient for opening the sale where the foreclosure has been by action. *Soule v. Ludlow*, 3 Hun, 503. Before the enactment of section 379, an action to redeem from a mortgage foreclosure must have been brought within ten years instead of twenty years as provided by that section. *Hubbell v. Sibley*, 50 N. Y. 468. Where the terms of sale have been carried into effect, the fact that the contract was not signed as required by the statute of frauds is immaterial. If the sale is irregular the owner of the equity of redemption cannot attack it in an action to recover an alleged surplus arising thereon; he cannot affirm it with

out being bound by its terms. It seems that if dissatisfied the remedy of such owner is by motion to set the sale aside.

Where property has been sold upon terms publicly stated at the time of sale, though not included in the printed notice, the mortgagor cannot affirm the sale as to the price bid when made upon the terms stated, and then repudiate the terms of sale, and claim, as surplus proceeds thereof, money which, by the terms of sale, was to be applied in payment of a prior mortgage, as though no such terms controlled the action and bid of the mortgagee. The auctioneer having stated, as the terms of sale, that the property was to be sold as if unincumbered, the purchaser to pay out of the amount for which the property should be struck off to him the amount of a prior mortgage lien then being foreclosed. *Held*, that the terms of sale were legal, proper and effectual, and that the application of the proceeds was controlled thereby. *Story v. Hamilton*, 86 N. Y. 428. A statutory sale, under a subsequent mortgage, does not affect one in possession under a contract of sale. *Dwight v. Phillips*, 48 Barb. 116.

§ 2396. An affidavit of the sale, stating the time when, and the place where, the sale was made, the sum bid for each distinct parcel separately sold, and the name of the purchaser of each distinct parcel, may be made by the person who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of sale, and of the notice or notices of postponement, if any, may be made by the publisher or printer of the newspaper in which they were published, or by the foreman or principal clerk. An affidavit of the affixing of a copy of the notice at or near the entrance of the proper court-house, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the affixing of a copy of the notice in the book kept by the county clerk, may be made by the county clerk, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the service of a copy of the notice upon the mortgagor, or upon any other person upon whom the notice must or may be served, may be made by the person who made the service. Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels.

It is said, in the earlier cases, that all the requirements of the statute must be strictly complied with. *Layman v. Whiting*, 20 Barb. 559; *Bryan v. Butts*, 27 id. 503. But it is said, in *Mowry v. Sanborn*, 72 N. Y. 534, that the statutory proofs of foreclosure and sale are to be liberally construed, and are only required to be certain to a common intent, and if they are so, though technically defective, they are sufficient. Reversing 11 Hun, 545. If the affidavits are defective, amended affidavits, it seems, may be filed according to the fact, and, at least, as to the mortgagor, they may be filed at any time,

or other proof given. *Bunce v. Reed*, 16 Barb. 352; *Mowry v. Sanborn*, 72 N. Y. 534. A different rule seems to be held in *Dwight v. Phillips*, 48 Barb. 116, but the rule above is reiterated in *Story v. Hamilton*, 86 N. Y. 428. The affidavits may be taken before a notary public, and one copy of the notice of sale, to which all the affidavits are annexed, is sufficient; it is not necessary to annex a separate copy to each affidavit. The affidavits are *prima facie* evidence of the facts stated, and may be controverted; the power to sell does not rest on the *proof* of publication, but on the *fact* of the publication, and this may be shown independent of the affidavit. *Mowry v. Sanborn*, 68 N. Y. 153; *Mowry v. Sanborn*, 72 id. 534. It is sufficient if the affidavit of publication is made by the publisher of the papers in which it was printed. *Bunce v. Reed*, 16 Barb. 347. If the affidavit shows the notice was affixed twelve weeks before the sale, it is sufficient without showing that the party making the affidavit afterward saw it there. *Hornby v. Cramer*, 12 How. 491. The affidavits must show the places to which the notices were mailed to the parties were the residences of such parties. *Dwight v. Phillips*, 48 Barb. 116. All the affidavits showing a compliance with the provisions of the statute are essential, in the absence of a deed, to perfect the purchaser's title. *Layman v. Whiting*, 20 Barb. 559. And the affidavits should show that the proceedings were conducted according to the law in force when the foreclosure was commenced. *James v. Stull*, 9 Barb. 482. Where the premises are purchased by the mortgagee, the foreclosure is not complete without the affidavits which stand in the place of the deed. *Arnot v. McClure*, 4 Denio, 41; *Cohoes Company v. Gross*, 13 Barb. 138; *Layman v. Whiting*, 20 id. 559; *Bryan v. Butts*, 27 id. 503; *Howard v. Hatch*, 29 id. 297. If no affidavits are made, and a person other than the mortgagor is the purchaser, common-law proof may be made of publication of notice. *Brewster v. Power*, 10 Paige, 563. See, also, *Chalmers v. Wight*, 5 Robt. 713. The mortgagee's deed is not sufficient to convey title unless the sale was at public auction after statutory notice; and this is so even though the mortgage gives power of sale, expressly authorizing the mortgagee, on default, to sell the premises at private sale. *Lawrence v. Loan Company*, 13 N. Y. 200.

Affidavit of Affixing by Clerk.

STATE OF NEW YORK, {
County of Ulster, } ss.:

Martin S. Decker, deputy county clerk, of the city of Kingston, said county, being duly sworn says that he is the deputy county clerk of said county of Ulster, the county in which the mortgaged premises described in the annexed printed notice of sale are situated; that on the 17th day of December, 1886, he did affix a printed copy of notice of sale, a copy whereof is also hereto annexed, in a book prepared and kept by the clerk of said county of Ulster for that purpose; and also immediately enter in said book, at the bottom of such notice, the time when he received and affixed it, and did also immediately index the same to the name of the mortgagor in said notice named. Deponent further says that the time when he did and performed said acts was at least eighty-four days prior to the time in said notice specified for the sale of the mortgaged premises therein described.

(*Jurat.*)

(*Signature.*)

Affidavit of Auctioneer.

STATE OF NEW YORK, {
County of Ulster, } ss.:

Virgil B. Van Wagonen, of Kingston, in the county of Ulster, being duly sworn, doth depose and say that he is the person who officiated as auctioneer at the sale of the premises described in the annexed printed copy of the notice of sale by virtue of the mortgage therein mentioned, and pursuant to said notice, and that this deponent as such auctioneer, and at public auction on the 11th day of March, 1887, at twelve and a quarter o'clock in the afternoon of that day, at the front door of the court-house in the city of Kingston, county of Ulster, New York, by virtue of the power of sale contained in said mortgage, and pursuant to said notice, did sell to Cornelius Van Brunt, of the city and county of New York, upon the terms and subject to the reservations and conditions hereinafter mentioned, the lands and premises, a description whereof is contained in said mortgage, and set forth in said notice as follows: (Here insert description as in notice.)

Deponent further says that at said sale the said Cornelius Van Brunt purchased the said lands and premises above described at and for the price of \$1,500, he being the highest bidder therefor, and that being the highest sum bidden for the same. Deponent further says that such sale was in the day-time, and in all respects honestly and fairly and legally conducted, according to deponent's best knowledge and belief; that the premises, so far as the same consisted of distinct tracts, farms or lots, were sold separately, and no more tracts, farms or lots were sold than were necessary to satisfy the amount claimed to be due on said mortgage in said notice, at the day of the first publication thereof, and interest and costs and expenses allowed by law.

(*Jurat.*)

(*Signature.*)

Affidavit of Affixing on Court-House Door.

V. B. Van Wagonen, of the city of Kingston, in the county of Ulster and State of New York, being sworn, saith he did, on the 18th day of

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December, 1886, and at least eighty-four days prior to the time specified in the annexed printed copy of notice for the sale of the mortgaged premises therein described, fasten up a copy of the annexed printed notice in a proper and substantial manner, in a conspicuous place at or near the entrance of the building where the County Court of said county of Ulster is directed to be held, to-wit: on the outer side of the outward door of the court-house or building in the city of Kingston, where the County Courts are directed and appointed to be held, in and for the county of Ulster, in which said mortgaged premises are situated, that being the court-house or building where County Courts of said county are directed and appointed to be held, nearest to said mortgaged premises.

(*Jurat.*)

(*Signature.*)

Affidavit of Publication

STATE OF NEW YORK, }
Ulster County, } ss.:

John W. Searing, of the city of Kingston, Ulster county, State of New York, being duly sworn, doth depose and say that he is, and during the time of the publication was, one of the publishers and proprietors of the newspaper called the *Kingston Weekly Leader*, a public newspaper printed and published in the city of Kingston, county of Ulster, that being the county where the premises described in the annexed printed notice of sale, or part thereof, are situated. Deponent further says that the notice of the mortgage sale, of which a printed copy is hereto annexed, was published in said newspaper at least once in each of the twelve weeks immediately preceding the day of sale specified in said notice of sale; said publication having been commenced on the 17th day of December, 1886, and ending on the 11th day of March, 1887.

(*Jurat.*)

(*Signature.*)

Form of Affidavit Serving Notice.

STATE OF NEW YORK, }
Ulster County, } ss.:

Sturgis Bulkley, of the town of Hardenbergh, county of Ulster, State of New York, being duly sworn, says: That he resides in said town of Hardenbergh; that on the 18th day of December, 1886, this deponent served a copy of the said notice on each of the several persons next hereinafter named, by depositing a copy of the said notice in the post-office hereinafter stated, properly inclosed in a post-paid wrapper, directed to the persons to be served, at their respective places of residence, to-wit: To the several persons next hereinafter named, and at and to the post-offices set opposite their names respectively, as hereinafter stated; that on the day last aforesaid this deponent deposited all of said notices so inclosed and directed as aforesaid, in the post-office at Hardenbergh, where said Sturgis Bulkley resided, and paid the full legal postage on each of them.

That at the time said notices were so deposited in the post-office at Hardenbergh there was a regular communication by mail at least once in each week between said Hardenbergh post-office and each of the other post-offices to which said notices were directed, and that at

the time each of the said persons resided at the respective places to which their said notices were so directed. That the names and the direction of said notices to them as aforesaid were respectively as follows, to-wit: (Here insert names, direction.) Deponent further says that at the times and the places hereinafter named, he served personally a copy of said notice of foreclosure and sale on the following persons, viz.: (Here insert names, place of service and date of service), by delivering a copy of the same to each of said persons personally, and leaving the same with each of them.

(*Jurat.*)

(*Signature.*)

§ 2397. [*Amended, 1882.*] The matters required to be contained in any or all of the affidavits specified in the last section may be contained in one affidavit, where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit; and a printed copy of each notice of postponement must be annexed to the affidavit of publication, and to the affidavit of sale. But one copy of the notice suffices for two or more affidavits, where they all refer to it, and are annexed to each other, and filed and recorded together.

See *Mowry v. Sanborn*, 72 N. Y. 534.

§ 2398. The affidavits, specified in the last two sections, may be filed in the office for recording deeds and mortgages, in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording mortgages. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold, which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein.

It was held previous to the Revised Statutes that the omission to record power of sale before conveyance did not vitiate the sale. *Wilson v. Troup*, 2 Cow. 145; *Jackson v. Colden*, 4 id. 266. It is held in *Layman v. Whiting*, 20 Barb. 559, and *Bryan v. Butts*, 27 id. 503; affirmed, 28 How. 582, that in order to maintain ejectment the affidavits must be filed and recorded. But see *Howard v. Hatch*, 29 Barb. 297; *Arnot v. McClure*, 4 Denio, 41; *Cohoes Co. v. Goss*, 13 Barb. 138. But the filing and recording of the affidavits is not necessary as against the mortgagor's equity of redemption which is barred and foreclosed by the proceedings. *Tuthill v. Tracy*, 31 N. Y. 157. The omission to record does not invalidate the purchaser's title, so held under Revised Statutes. *Howard v. Hatch*, 29 Barb. 297. Where there has been a sale pursuant to a power under the statute, the equity of redemption of the mortgaged premises is thereby foreclosed, though the affidavit of publication of notice of sale and of the posting thereof be not made and recorded

as required by statute for twenty years thereafter. The right of the mortgagor to redeem is terminated whenever there has been a sale of the mortgaged premises, regularly made pursuant to the power contained in the mortgage or under a decree of sale. *Tut-hill v. Tracy*, 31 N. Y. 157. This case is cited in *Osborn v. Merwin*, and it is there held that a sale had under a foreclosure by advertisement pursuant to the statute bars the equity of redemption although no affidavits are made. The character of common-law evidence necessary is there pointed out, and *Hawley v. Bennett*, 5 Paige, 104, and *Guy v. Mead*, 22 N. Y. 462, are referred to as authority. The facts necessary to be proven by affidavit, the right to supply defects by parol, and the character of parol evidence to show the facts are discussed in *Mowry v. Sanborn*, reported on three appeals to the Court of Appeals in 65 N. Y. 581; 68 id. 153; and 72 id. 534. Also below, 62 Barb. 223; 7 Hun, 380; 11 id. 545, and the reported cases referred to and collated. See, also, *Story v. Hamilton*, 86 N. Y. 428; affirming 20 Hun, 133.

§ 2399. A clerk or a register, who records any affidavits, or a certified copy thereof, filed with him, must make a note, upon the margin of record of the mortgage, in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded.

Note by Clerk upon Margin of Record of Mortgage.

The affidavits of sale of the property described in this mortgage are recorded in book No. 203 of mortgages, at page 46.

Dated April 5, 1886.

J. D. WURTS,
Clerk.

§ 2400. The purchaser of the mortgaged premises, upon a sale conducted as prescribed in this title, obtains title thereto, against all persons bound by the sale, without the execution of a conveyance. Except where he is the person authorized to execute the power of sale, such a purchaser also obtains title, in like manner, upon payment of the purchase-money, and compliance with the other terms of sale, if any, without the filing and recording of the affidavits, as prescribed in the last section but one. But he is not bound to pay the purchase-money, until the affidavits, specified in that section, with respect to the property purchased by him, are filed, or delivered or tendered to him for filing.

As to this section the codifiers say that additions to this section have been made so as to express the meaning of the statute as expounded by recent decisions: They say further: "It was held in *Layman v. Whiting*, 20 Barb. 559, and *Bryan v. Butts*, 27 id. 503, following the authority of *Arnot v. McClure*, 4 Denio, 41, that in the absence of a conveyance the legal title does not pass to the purchaser so as to enable him to maintain ejectment until the affidavits are made and recorded." And in *Cohoes Co. v. Goss*, 18

Barb. 127, it was said that no title passes to the purchaser unless the affidavits are recorded. But in *Howard v. Hatch*, 29 Barb. 297, and *Chalmers v. Wright*, 5 Robt. 713, it was decided that the legal title passes upon the sale, and that the recorded affidavits are not the only competent evidence of the sale. See, also, *Tuthill v. Tracy*, 31 N. Y. 157, holding that the mortgage is foreclosed by the sale prior to the recording of the affidavits.

§ 2401. The following costs, in addition to the expenses specified in the next section, are allowed, in proceedings taken as prescribed in this title:

1. For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this title, for each folio, twenty-five cents; for making each necessary copy thereof, for each folio, thirteen cents.

2. For serving each copy of the notice of sale required or expressly permitted to be served by this title, and for affixing each copy thereof, required to be affixed upon the court-house, as prescribed in this title, one dollar.

3. For superintending the sale, and attending to the execution of the necessary papers, ten dollars.

§ 2402. The sums, actually paid for the following services, not exceeding the fees allowed by law for those services, are allowed in proceedings, taken as prescribed in this title:

1. For publishing the notice of sale, and the notice or notices of postponement, if any, for a period not exceeding twenty-four weeks.

2. For the services specified in section two thousand three hundred and ninety of this act.

3. For recording the affidavits; and also, where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof.

4. For necessary postage, and searches.

§ 2403. The costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place, upon the request and at the expense of any person, interested in the payment thereof. Each provision of this act, relating to the taxation of costs in the supreme court, and the review thereof, applies to such a taxation.

One who claims the surplus as heir at law of the mortgagor and has been recognized as such, is entitled to require taxation. *Matter of Moss*, 6 Hun, 263. Services not mentioned in the statute cannot be taxed although actually necessary, but one who obtained an injunction restraining the sale but allowed the continuation of the notice of publication, cannot on taxation object to the allowance of the whole expense of publication although it exceeded the statutory time. *Collins v. Standish*, 6 How. 493. Where the mortgagee omitted to notify certain necessary parties and for that reason postponed the sale, it was held he could not tax costs of the sale first attempted. *Hornby v. Cramer*, 12 How. 490.

In taxing costs in such proceeding, matter inserted in the notice, which was not required by the statute, should not be considered in

determining the number of folios to be allowed, nor should a charge be allowed for serving notices on persons not required by the statute to be served. A charge for drawing notices and for a copy to keep is proper, as is also a copy for the printer, and printed copies may be charged for. As one printed notice is sufficient for two or more affidavits, under section 2397, there is no necessity for more than one, to which the several affidavits may be attached, and that one will be allowed, for a charge cannot be made for a copy served on the auctioneer, but it is proper to charge for thirteen weeks' publication. Devises under the recorded will of a deceased mortgagor, and a lessee under a recorded lease, may be deemed grantees, who should be served with notice, and where such devisees are minors under fourteen years of age, a notice is also properly served on their guardian, which may be charged for. *Ferguson v. Wooley*, 9 Civ. Pro. 236.

Bill of Costs on Foreclosure by Advertisement.

Notice of sale, ten folios, at 25 cents	\$2 50
Copy same, to keep, at 13 cents.	1 30
Copy, notice for printer, at 13 cents	1 30
Copy for notice for posting on court-house door	1 30
Expense of posting	1 00
Affidavit of posting, two folios and copy, at 25 cents.....	53
Copy notice annexed, at 13 cents	10
Clerk's fees on same	50
Affidavit of posting in clerk's office, two folios and copy, at 13 cents.	52
Printer, publishing notice, thirteen insertions, ten folios....	43 50
Printer, publishing two postponements of sale, two folios...	3 00
Printer, publishing one additional insertion, notice of sale..	2 50
Affidavit of publication, two folios and a copy, at 13 cents..	39
Copying notice annexed, at 13 cents	1 30
Copy of notice to serve on mortgagor, at 13 cents ..	1 30
Serving ten notices.	10 00
Affidavit of service, two folios and copy, at 38 cents.....	76
Copying notice annexed, five folios, at 13 cents.....	1 30
Postages	50
Clerk's fees for search.....	8 00
Affidavit of circumstances of sale, four folios and copy, at 38 cents	1 52
Copy printed notice annexed.....	1 35
Superintending sale	10 00
Recording affidavits.....	4 00
Oaths to five affidavits, at 10 cents.....	50

\$88 67

ULSTER COUNTY, ss.:

Virgil D. Van Wagonen, of the city of Kingston, said county, being duly sworn, says that he is the attorney for Charles Van Brunt, the

assignee of the mortgage executed by Joseph Reil to John Q. Adams, and which has been foreclosed under the statute.

That, according to the best of deponent's knowledge and belief, the several disbursements charged in the bill of costs hereto annexed have been actually and necessarily paid or incurred; that the copies of papers charged for therein were actually and necessarily used or obtained for use; that such bill of costs contains no charge for any draft or copy of any affidavit or other paper which has not been made, or for any other service which has not been performed, except such services as are allowed by law to be taxed prospectively, and that the number of folios contained in the draft or in the copies of said papers are not overcharged in such bill.

(*Jurat.*)

(*Signature.*)

§ 2404. An attorney or other person who receives any money, arising upon a sale, made as prescribed in this title, must, within ten days after he receives it, pay into the Supreme Court the surplus, exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect, as if the proceedings to foreclose the mortgage were taken in an action, brought in the Supreme Court, and triable in the county where the sale took place.

§ 2405. A person, who had, at the time of the sale, an interest in or lien upon the property sold, or a part thereof, may, at any time before an order is made, as prescribed in the next section but one, file in the office of the clerk of the county, where the sale took place, a petition, stating the nature and extent of his claim, and praying for an order, directing the payment to him of the surplus money, or a part thereof.

Petition for Payment of Surplus Moneys.

To the Supreme Court :

The petition of John Mills, of the city of Kingston, respectfully shows that heretofore proceedings were taken by Charles Van Brunt, pursuant to title 9 of chapter 17 of the Code of Civil Procedure, for the sale of the real property described as follows, to-wit (describe the same), in foreclosure of a mortgage executed by Joseph Reil to John Q. Adams, dated January 28, 1883, and recorded in Ulster county clerk's office on the 2d day of August, 1883, at 1:30 o'clock in the afternoon in book No. 166 of mortgages, at page 61, and a sale of said property was made in said proceedings on the 25th day of March, 1886.

That a surplus remained of the proceeds of said sale amounting to \$400 over and above the sum due, and to grow due upon said mortgage and the costs and expenses of the said foreclosure, and that on the 10th day of April, 1886, the attorney for the assignee of said mortgage, by whom said mortgage was foreclosed, paid into this court and to the county treasurer of Ulster county the said surplus.

And your petitioner further shows, that at the time of said sale he had an interest in, or lien upon, the said property, said interest or lien being by reason of (state nature of interest or lien); and your petitioner claims that he is entitled to said surplus moneys, by reason of his said interest in, or lien upon, said property. And your petitioner prays for an order of this court directing the payment to him of said

492 PROCEEDINGS TO FORECLOSE A MORTGAGE BY ADVERTISEMENT.

surplus moneys, or of so much of said surplus moneys as may be necessary to satisfy his said interest or lien.

Dated . . .

(Signature.)

(Add verification.)

§ 2406. A person filing a petition, as prescribed in the last section, may, after the expiration of twenty days from the days of sale, apply to the Supreme Court, at a term held within the judicial district, embracing the county where his petition is filed, for an order pursuant to the prayer of his petition. Notice of the application must be served, in the manner prescribed in this act for the service of a paper upon an attorney in an action, upon each person who has filed a like petition, at least eight days before the application; and also upon each person, upon whom a notice of sale was served, as shown in the affidavit of sale, or upon his executor or administrator. But, if it was shown to the court, by affidavit, that service upon any person, required to be served, cannot be so made with due diligence, notice may be given to him in any manner which the court directs.

Notice of Motion for Surplus Moneys.

(Title of proceeding.)

SIRS—Take notice that the undersigned will apply at, etc., on, etc., for an order pursuant to the prayer of his petition, filed in the Ulster county clerk's office on the 20th day of May, 1886, directing the payment to him of the surplus moneys arising upon the sale of the property described in the said petition, a copy of which is herewith served upon you, and for such other and further relief as may be proper.

Dated

Yours, etc.,

WM. D. BRINNIER,

Attorney for Petitioner.

To

§ 2407. Upon the presentation of the petition, with due proof of notice of application, the court must make an order, referring it to a suitable person, to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money; and the priorities of the several liens thereupon. Upon the coming in and confirmation of the referee's report, the court must make such an order, for the distribution of the surplus money, as justice requires.

Order of Reference as to Surplus Moneys.

(Caption usual form.)

(Title of proceeding.)

Upon the presentation of the petition of John Mills, dated May 10, 1886, which was filed in the Ulster county clerk's office on the 10th day of May, 1886, with proof of due service of notice of this application upon each person who has filed a like petition, and also upon each person upon whom a notice of sale was served, as was shown in the affidavit of sale, and on motion of Wm. D. Brinnier, attorney for the said petitioner, and after hearing, etc., and on reading (name opposing papers).

It is hereby ordered, that S. T. Hull, Esq., of Kingston, counselor at law, be and he hereby is appointed referee, to ascertain and report the amount due to the petitioner and to each other person, which is a lien upon the surplus money mentioned in said petition of John Mills and the priorities of the several liens thereupon.

WM. L. LEARNED,

Justice Supreme Court.

Form for Report of Referee as to Priority of Liens, etc.

(*Title of proceeding.*)

I, the undersigned referee, appointed by order of this court, dated May 20, 1886, to ascertain and report the amount due to John Mills, the petitioner in this proceeding, and to each other person, which is a lien upon the surplus moneys arising upon the sale of the premises described in the said petition and the priority of the several liens thereupon, do respectfully report (proceed substantially as in report in foreclosure by suit, making necessary changes to suit the case).

Dated June 12, 1886.

(*Signature of referee.*)

Order upon Report of Referee.

(*Caption.*)

(*Title of proceeding.*)

On reading and filing the report, dated June 12, 1886, of S. T. Hull, Esq., referee, appointed herein by order of this court, dated May 20, 1886, from which it appears that John Mills is entitled to the whole of the surplus moneys arising upon the sale of the real property described in his petition, filed in the Ulster county clerk's office, on the 10th day of May, 1886, which surplus has been paid into court and to the county treasurer of Ulster county (or make other recitals according to the report), and it appearing that due notice of this motion has been given to (name parties served):

Now, on motion of Wm. D. Brinnier, Esq., counsel for said petitioner, and after hearing, etc. (or no one appearing to oppose), and on reading (name any other motion papers):

It is hereby ordered that the said report be and the same is hereby confirmed, and that said county treasurer pay, etc. (here insert provisions for distribution as may be required).

WM. L. LEARNED,

Justice Supreme Court.

Where a mortgage, payable in installments, is foreclosed for the amount due, subject to future installments, the land becomes the primary fund for the future payments, and the mortgagor is entitled to the surplus on the sale. *Cox v. Wheeler*, 7 Paige, 248. After foreclosure the mortgagee is not liable, as trustee, to the holders of subsequent liens for the surplus, if he has received only the amount due him on the mortgage and the expenses of foreclosure, leaving the surplus in the hands of the purchaser who asserts a claim thereto. The mortgagee's liability is to the mortgagor and those who represent him, and a purchaser who claims and retains the surplus, as holder of the second mortgage lien, is liable to a subsequent judgment creditor for the balance of the surplus after deducting the amount of his own lien, but is not liable for interest on such balance until after notice or demand by the party entitled to it. *Russell v. Dyflon*, 4 Lans. 399. A subsequent incumbrancer, with no notice of the foreclosure, has no claim to surplus moneys on the sale, his

lien not having been affected, unless he releases to the purchaser all claim on the equity of redemption. *Walker v. Harris*, 7 Paige, 167; *Winslow v. McCall*, 32 Barb. 241. Although the receipt by the mortgagor, or his representative, of the surplus moneys arising on the sale may not estop him from questioning the regularity of the proceedings, it would seem to be evidence to be considered in passing on the question. *Candee v. Burke*, 1 Hun, 546. It is a defense by a mortgagee who has sold under the statute, when sued for the surplus by the mortgagor's grantee, that the former had a lien on the land equal to the surplus. *Eddy v. Smith*, 13 Wend. 488. Where property has been sold upon terms stated publicly at the sale, though not included in the published notice, the mortgagor cannot affirm the sale as to the price bid when made upon the terms stated, and then repudiate the terms of sale and claim, as surplus money, which, by the terms of sale, was to be applied in payment of a former mortgage, as though no such terms controlled the action and bid of the mortgagee in bidding in the property. *Story v. Hamilton*, 20 Hun, 133; affirmed, 86 N. Y. 428.

§ 2408. The last four sections do not apply to surplus money, arising upon the sale of real property, of which a decedent died seized, where letters testamentary or letters of administration, upon the decedent's estate, were, within four years before the sale, issued from a Surrogate's Court within the State, having jurisdiction to issue them.

The provisions of sections 2798 and 2799 are as follows :

§ 2798. Where real property, or an interest in real property, liable to be disposed of as prescribed in this title, is sold, in an action or a special proceeding, specified in the last section, to satisfy a mortgage or other lien thereupon which accrued during the decedent's life-time, and letters testamentary or letters of administration upon the decedent's estate were, within four years before the sale, issued from a Surrogate's Court of the State having jurisdiction to grant them, the surplus money must be paid into the Surrogate's Court from which the letters issued. If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after payment of all the liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus exceeding the lien to satisfy which the property was sold, and the costs and expenses, must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money. The receipt of the surrogate, or the clerk of the Surrogate's Court, or the county treasurer, as the case may be, is a sufficient discharge to the person paying the money.

§ 2799. Where money is paid into a Surrogate's Court, as prescribed in the last section, and a petition for the disposition of property, as prescribed in this title, is pending before him; or is presented at any time before the distribution of the money; the money must be distributed as if it was the proceeds of the decedent's real property, sold pursuant to the decree. If such a petition is not pending or presented, or if a decree for the disposition of the decedent's property is not made thereupon, a verified petition, praying for a decree directing the distribution of

the money among the persons entitled thereto, may be presented by any of those persons. Each person who would be entitled to share in the distribution of the proceeds of a sale must be cited to show cause why such a decree should not be made. Service of the citation may be made upon all the persons designated therein, by publishing the same in two newspapers designated as prescribed in article first of title second of this chapter, at least once in each of the four successive weeks immediately preceding the return day thereof, except that personal service must be made upon the husband, wife, heirs and devisees of the decedent, and also upon every other person claiming under them, or either of them, who resides in this State. Upon the return of the citation, the rights and priorities of the persons interested must be established, and a decree for distribution must be made, as if it was the proceeds of real property sold.

It was held in *Dunn v. Ocean National Bank*, 61 N. Y. 497, that the statute as it then stood as to distribution of surplus by Surrogate's Court had only a limited scope, and was simply designed to provide a method for applying the surplus to the payment of debts. It made no change in the law as to the proper person considered as owner to bring an action for the surplus. The surplus is regarded as real estate, and the most careful precautions are taken to prevent the heirs from being deprived of it, except in the same manner as if the land had remained unsold. Affirming 6 Lans. 296. These provisions do not apply to sales on foreclosure by action. *German Savings Bank v. Shaver*, 25 Hun, 409.

The words, "within four years before the sale," section 2798, refer to the date of sale, and not to the commencement of proceedings resulting in a sale. *White v. Poillon*, 25 Hun, 69. A judgment creditor whose judgment was not a lien has no right to share in the distribution of the proceeds of sale of decedent's real estate on foreclosure. *Davis v. Davis*, 4 Redf. 355. In section 2799 the word "may" means "shall." Before the amendment of 1881 it was held that service by publication was the only mode of giving jurisdiction. *Matter of Solomon*, 4 Redf. 509. As to disposition of surplus in a peculiar case see *Lahrt v. Zahrt*, 1 Dem. 444.

§ 2409. [Amended, 1882.] This title does not affect any provision of law, inconsistent therewith, especially relating to the foreclosure of mortgages to the people of the State, or to the commissioners for loaning certain moneys of the United States.

Loan commissioners' mortgages.—The following decisions bear upon the rights and powers of loan commissioners, and the manner and validity of foreclosure by them. The loan officers must strictly pursue the directions of the statute. If there be a defect in the notice or advertisement or conduct of sale, it is fatal to the sale. *Denning v. Smith*, 3 Johns. Ch. 332; *Sherman v. Dodge*, 6 id. 107. *Rogers v. Murray*, 3 Paige, 390; *Sherwood v. Reade*, 7 Hill, 431.

A sale by one of two commissioners is void; both must be present and participate in the sale, and the deed by the two cannot aid such a sale. Nor can one commissioner give valid notice of sale. Both must act in all official acts. *N. Y. Life Ins. Co. v. Staats*, 21 Barb. 570; *Powell v. Tuthill*, 3 N. Y. 396; *Olmstead v. Elder*, 5 id. 144. Former sales by one commissioner were confirmed by chapter 704, Laws of 1867. It is sufficient if the notice of sale is published for six successive weeks previous to the sale, although the first publication be less than forty-two days prior thereto. *Wood v. Terry*, 4 Lans. 80. A general description of the land in the notice was sufficient under statute of 1808. *Jackson v. Harris*, 3 Cow. 241.

The omission to name number of lot and name of mortgagor in notice is fatal, and it is said that posting notices in distant places will render the sale invalid, or *inside* the court-house door. Notice must be published and posted for same length of time. *Denning v. Smith*, 3 Johns. Ch. 332. See, also, *King v. Stow*, 6 id. 323. The deed of the loan commissioners on an irregular sale, before the Revised Statutes, vests the legal title in the purchaser. *Brown v. Wilbur*, 8 Wend. 657; *Rogers v. Murray*, 3 Paige, 390. As to place of sale, where new county has been erected, see *People v. Supervisors of Delaware*, 5 Cow. 436; *Rogers v. Murray*, 3 Paige, 390. The manner of sale and method of conveyance are prescribed in *York v. Allen*, 30 N. Y. 104. The advertisement of sale must indicate who gave the mortgage, and to whom, clearly, and the commissioners, in case of default, become seized as trustees, only subject to the possession and right of the mortgagor to redeem, until a legal sale is made in conformity with the statute. *Thompson v. Commissioners*, 79 N. Y. 54. The commissioners cannot make it one of the terms of sale that the purchaser shall pay down a part instead of the whole, and that in default of payment there shall be a resale. *Sherwood v. Reade*, 7 Hill, 431. As to when a default amounted to a foreclosure under the statute of 1808, and as to conditional right to redeem under that statute, see *Jackson v. Voorhees*, 9 Johns. 129; *Sherrill v. Crosby*, 14 id. 358; *Jackson v. Rhodes*, 8 Cow. 47. Upon default for twenty-three days the mortgagor's interest is absolutely gone; the foreclosure provided for by statute is equivalent to a decree. The right to redeem is not an equity of redemption nor an interest in the land, but a special right to be availed of in the manner provided by statute. *Pell v. Ulmar*, 18 N. Y. 139. Application to redeem must be before the lapse of twenty-three

days. *Fellows v. Commissioners of Oneida*, 36 Barb. 655. The statute as to entry of proceedings in the mortgage book is directory.

Wood v. Terry, 4 Lans. 80. And when both the commissioners are present and unite in making a sale, the fact that the entry in the minute-book, purporting to be the entry of both, was made by one and signed by one, is not a fatal irregularity. *White v. Lester*, 1 Keyes, 316.

The power of sale is not exhausted by one sale. If the foreclosure is set aside by a court a second foreclosure may be had. *Stackpole v. Robbins*, 48 N. Y. 665. The validity of the sale to a *bona fide* purchaser is not affected by the omission of the commissioners to enter in the minute-book the order for and copy of the advertisement of sale, and designation of the places where, and persons by whom, advertisements were posted. *White v. Lester*, 1 Keyes, 316; *Rowell v. Tuthill*, 3 N. Y. 396. Entry of mortgage on books of commissioners, out of order and under wrong date, and on wrong page, is not notice to subsequent mortgagees in good faith. *N. Y. Life Ins. Co. v. White*, 17 N. Y. 469. If the mortgagor purchases and gives a new mortgage it is a purchase-money mortgage. On a subsequent default the commissioners hold against one who has acquired title under a judgment docketed intermediate the two mortgages. *Commissioners v. Chase*, 6 Barb. 37. See Opinions of Attorneys-General, 164. The requirement as to two witnesses to a deed is directory. *Id.* Equity cannot set aside a sale merely for hardship or inadequacy of price. *Marsh v. Ludlum*, 3 Sandf. Ch. 35; *Rogers v. Murray*, 3 Paige, 390. Commissioners are limited to the fees fixed by statute, and cannot tax fees as attorneys. *Commissioners of Ulster v. Van Dermark*, 36 How. 145. Where a sale by loan commissioners was illegal and void the mortgagor may bring an action to redeem, and for rents and profits. In such a case the omission to make tender is not fatal to the action, but at most only affects the question of costs. *Thompson v. Loan Commissioners*, 79 N. Y. 54. Loan commissioners have no power to sell a mortgage taken by them, and moneys paid to them in pursuance of an agreement to sell cannot be applied either as upon a purchase or in payment of such mortgage. *Woodyate v. Fleet*, 44 N. Y. 1.

CHAPTER XXII.

PROCEEDINGS TO CHANGE THE NAME OF AN INDIVIDUAL.

In *Petition of John Snook*, 2 Hilt. 566, Judge Daly examines the origin of proper names and the law respecting the use of them. It is said that the law supposes every person to have two names, one the family, the other the given name. A separate single letter is not a name. *Frank v. Levie*, 5 Robt. 599. But it is held in *Lynch v. Tomlinson*, Abbott's Annual, 1884, that a person may have an initial as a name. The law recognizes but one Christian name, so that an error in the middle name may be struck out as surplusage; the middle name is no part of the name. *Van Voorhis v. Budd*, 39 Barb. 479; *Milk v. Christie*, 1 Hill, 102. Where circumstances tended to show that the same person was intended, it was held that the insertion of a middle name in an indorsement was not such a variance as to authorize the inference that a different person was intended. *Arnold v. National Bank*, 3 T. & C. 769. But it is said in *Kortz v. Canvassers of Greene*, 12 Abb. N. C. 86, that the rule that the middle letter is no part of a man's name and may be regarded as surplusage, and that the law recognizes but one Christian name, has no application in the case of variations in the middle initials in ballots at an election. One may legally name himself, or change his name, or acquire a name by reputation, general usage and habit. *Matter of Petition of Snook*, 2 Hilt. 566; *England v. New York Publishing Co.*, 8 Daly, 375. And a plaintiff may sue by the name by which she is generally known though she may have another. *Frebing v. Vetter*, 12 Abb. N. C. 303. Where a name appears to be a foreign one, a variance of a letter, which according to the pronunciation of that language does not change the sound, is not a misnomer. *Jackson v. Prevost*, 2 Caines, 164. As to misnomers, see 1 City Court Rep'r, 115, in note to *Stuber v. Schuarts*. If a man be known by the addition of "Junior" to his name, an indictment against him without that addition is not conclusive that he was not the person indicted, if found by special verdict that he was the person meant. If names are identical it is *prima facie* evidence that the persons are the same from identity of name, but not from identity of initials and surname. *People v. Smith*, 45 N. Y. 772. The name by which a tax payer is generally known, although not his real one, may be entered on assessment-roll, and he will be bound

thereby. *Van Voorhis v. Budd*, 39 Barb. 479. In *Booth v. Jarrett*, 52 How. 169, it was said that injunction would not be granted restraining the use of a person's name as applied to a theater when it had been mortgaged and sold under that name.

§ 2410. A person of full age, residing within the State, may apply to the County Court of the county in which he resides; or, if he resides in the city of New York, to the Court of Common Pleas of that city and county, or to the City Court of New York, for leave to assume another name.

§ 2411. Where the applicant resides in the city of Buffalo, the application may be made, either to the County Court of Erie county, or to the Superior Court of Buffalo. Where he resides in Brooklyn, it may be made either to the County Court of Kings county, or to the City Court of Brooklyn.

§ 2412. The application must be made by a written petition, which must be signed by the petitioner; must specify the name which he proposes to assume; must state the grounds of the application; and must be verified, in like manner as a verified pleading, in an action in the Supreme Court.

On petition to change the name of a person it must appear whether he is married or single, whether there are any judgments against him, or actions pending; whether there is any outstanding commercial paper in the name sought to be abandoned, and also his age and birth place and the names of his parents. *Matter of Hamilton*, 10 Abb. N. C. 79. The decisions in *Petition of Snook*, 2 Hilt. 566, and *Matter of Ludwig*, 1 Law Bull. 14, requiring that pecuniary benefit must be shown as likely to result to petitioner are rendered obsolete by the present section.

Form of Petition.

To the County Court of the County of Ulster :

The petition of Abner Bush respectfully shows that he is of full age, to-wit, of the age of twenty-one years and upwards, and resides in the town of Wawarsing, in the county of Ulster in this State.

That he desires to assume another name than that now held by him, and that the name which he proposes to assume is Cornelius Dunlap.

That the grounds for this application for such change of name are as follows, to-wit (name same):

That he is married (or is unmarried).

That there are no judgments rendered, or actions pending against him, or that the following actions and no others are pending against him, to-wit (state them), and that the following judgments, and no others, have been rendered against him, to-wit (state them):

That the following commercial paper is outstanding in the said name sought to be abandoned by him, to-wit (describe same), or that no commercial paper is outstanding in, etc.:

That your petitioner was born in the city of Syracuse, Onondaga county, State of New York, and the name of his father is John Bush, and that of his mother is Fannie Bush:

And your petitioner prays the order of this court granting leave to assume the name of Cornelius Dunlap in place of that of Abner Bush, his present name, pursuant to the provisions of title 10 of chapter 17 of the Code of Civil Procedure, and for such further or other relief as may be proper.

Dated *April 2, 1887.*

ABNER BUSH.

(*Add verification.*)

§ 2413. If the court, to which the petition is presented, is satisfied thereby, or by proof, by affidavit, presented therewith, that there is no reasonable objection to the petitioner's assuming the name proposed, it must make an order, authorizing the petitioner to assume that name, on a day specified therein, not less than thirty days after the entry of the order, upon his complying with the provisions of the next section but one.

Precedent for Order.

(*Caption.*)

(*Title of proceeding.*)

Upon reading and filing the petition of Abner Bush, of, etc., dated April 2, 1887, praying for leave to assume the name of Cornelius Dunlap in place of his present name, and on filing proof of due service of notice of the presentation of said petition at this time and place upon the proper parties, and on motion of W. S. Fredenburgh, counsel for said petitioner, and no one opposing, and the court being satisfied by said petition and affidavits that there is no reasonable objection to the petitioner assuming the name proposed:

It is hereby ordered that the said Abner Bush be and he is hereby authorized to assume the name of said Cornelius Dunlap in place of his present name, on the 1st day of July, 1887, upon his complying with the provisions of section 2415 of the Code of Civil Procedure, viz.: That they cause a copy of this order to be published within ten days after this order is made in *The Kingston Daily Leader*, a newspaper published in the county of Ulster, and that within twenty days after the making of this order he cause the papers upon which it was granted, and an affidavit of the publication thereof, as above directed, to be filed and recorded in the county clerk's office of the said county of Ulster, and that after the said requirements are complied with the said petitioner must, on and after the said 1st day of July, 1887, be known by the name which he is hereby authorized to assume, and by no other name.

§ 2414. An infant may also apply, by his general guardian, or the guardian of his person, or by his next friend, for leave to assume another name. Where he applies by his next friend, notice of the time when, and the place where, the petition will be presented, must be served, as prescribed in this act for the service of a paper upon an attorney, in an action, upon the father; or, if he is dead, upon the mother; or, if both are dead, upon the general guardian of the infant, or the guardian of his person. But where it appears, by proof, to the satisfaction of the court, that the infant had no father or mother, or that both reside without the State, and that he has no guardian, residing within the State, the court may dispense with notice, or require notice to be given to such persons, and in such a manner, as it thinks proper. Upon the hearing, the court must, in addition to

the matters specified in the last section, be satisfied by the proofs, that the interests of the infant will be substantially promoted by the change of his name. Except as otherwise prescribed in this section, the provisions of this title, relating to an application by a person of full age, apply to an application by an infant.

Form for Petition by Infant.

To the County Court of Ulster County :

The petition of Jane Bull, an infant, by her general guardian, respectfully shows: That said Jane Bull is an infant, under the age of twenty-one years, and became of the age of thirteen years August 12, 1886, and that said infant resides in the town of Rosendale, in the county of Ulster, in this State; that the said Jane Bull desires to assume another name than that now held by her, and that the name which she proposes to assume is Martha Sanders; that the grounds for her application are (state same), and that your petitioner verily believes that the interests of said infant will be promoted by the change of her name as aforesaid; that the father of said infant is dead, and that Fannie Bull is the mother of said infant, and resides at Rosendale, in said county, and that Julius Dennison is the general guardian of said infant, and resides at Rosendale aforesaid. And your petitioner prays the order of this court granting leave to said infant to assume the name of Martha Sanders in place of that of Jane Bull, pursuant to statute.

(Verification by guardian.)

JANE BULL,
By JULIUS DENNISON,
Her Guardian.

§ 2415. Within ten days after the order is made the petitioner must cause a copy thereof to be published in a newspaper published in the county in which the order was made; and within twenty days after the making of the order he must cause the papers upon which it was granted, and an affidavit of the publication thereof, to be filed and recorded as prescribed in this section. Where the order was made in any county except New York, the papers must be filed and recorded in the county clerk's office. When the order was made by the Court of Common Pleas for the city and county of New York, or the City Court of New York, they must be filed and recorded in the office of the clerk of that court.

Affidavit of Publication of Order.

STATE OF NEW YORK, }
County of Ulster, } ss. :

John W. Searing, of the city of Kingston, being duly sworn, says: That he is, and has been, since the 1st day of April, 1886, the publisher of the *Kingston Daily Leader*, a newspaper published at Kingston, Ulster county, and that the annexed order has been published daily in the said newspaper since the 10th day of June, 1886, up to and including this date.

(Jurat.)

(Signature.)

(Annex copy of order.)

§ 2416. If the requirements of the last section are complied with, the petitioner must, on and after the day specified for that purpose in the order, be known by the name which he is thereby authorized to assume, and by no other name.

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§ 2417. An action or special proceeding, civil or criminal, theretofore or thereafter commenced against a person whose name is changed as prescribed in this title, shall not abate, nor shall any relief, recovery or other proceeding therein be prevented, impeded or impaired in consequence of the change of name. The plaintiff in the action, or the party instituting the special proceeding, or the people, as the case requires, may, at any time, obtain an order amending any of the papers or proceedings therein, by the substitution of the new name, without costs and without prejudice to the paper or proceeding.

§ 2418. The clerk of each county, except the county of New York, and the clerk of the Court of Common Pleas for the city and county of New York and the City Court of New York, must, annually, in the month of December, make a return to the secretary of State of all the changes of names of persons which have been made within his county since his last return, as prescribed in this title. The secretary of State must cause to be published from those returns, in the next volume of the Session Laws, a tabular statement showing the original name of each person and the name which he has been authorized to assume.

CHAPTER XXIII.

PROCEEDINGS FOR THE VOLUNTARY DISSOLUTION OF A CORPORATION.

§ 2419. If a majority of the directors, trustees or other officers having the management of the concerns of a corporation created by or under the laws of the State, discover that the stock, effects and other property thereof are not sufficient to pay all just demands for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders that the corporation should be dissolved, they may present a petition to the Supreme Court, or to a Superior City Court of the city where the principal office of the corporation is located, praying for a final order dissolving the corporation, as prescribed in this title.

Proceedings for the voluntary dissolution of a corporation are special and statutory, and although instituted in a court of general jurisdiction, must conform to the statute. *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557; *Matter of Westchester Iron Co.*, 15 How. 7. A court of equity has not, by virtue of its general and inherent powers, the right to dissolve a corporation, but such right is entirely statutory. *Bliven v. Peru Iron and Steel Co.*, 9 Abb. N. C. 205. The court has no power to appoint a temporary receiver, or to enjoin the bringing of suits against it prior to the entry of the order. The power can only be exercised on granting the final order. *Matter of French Mfg. Co.*, 12 Hun, 488; *Chamberlain v. Rochester, etc., Co.*, 7 id. 557; *Matter of E. M. Boyton & Co.*, 34 id. 369; *Matter of Waterbury*, 8 Paige, 380. And it seems not until the

coming in of the report of the referees to whom claims are to be presented. *Matter of Edson, etc., Co.*, 1 Law Bull. 52. A corporation cannot be dissolved by a resolution of its members or stockholders, only by a judicial sentence or surrender of its charter, accepted by the State. *N. Y. Marbled Iron Works v. Smith*, 4 Duer, 362; *Lake Ontario Bank v. Onondaga Bank*, 7 Hun, 549. When the charter provided that the corporation might discontinue business when stockholders owning two-thirds of the capital stock should vote to do so, it was held such a vote was effectual, but that the corporate existence continued to close its affairs. *Green v. Seymour*, 3 Sandf. Ch. 285. A decree for dissolution in an action by a stockholder or creditor, who is also the president, and in a case not authorized by statute, cannot be sustained, although consented to by the president and by one or more of the trustees individually, for an application for a voluntary dissolution must proceed from the company or its board of trustees. *Bliven v. Penn Steel and Iron Co.*, 9 Abb. N. C. 205. But a judgment in an action brought by the attorney-general is not invalidated by the consent of the company. *People v. Globe Ins. Co.*, 60 How. 52. It was held in *Matter of Niagara Ins. Co.*, 1 Paige, 258, that under the then existing statute the court would not decree a dissolution of the corporation simply upon request of a majority of the directors and stockholders. But see language of this section and section 2429. It was further held in that case that where the owners of a large proportion of the stock found it to their interest to withdraw their capital, it will be deemed presumptive evidence that the interest of the stockholders generally will be promoted by a dissolution of the corporation. The omission of a railroad company to elect officers, sale of its assets and failure to do business do not work a dissolution of a corporation; in order to do that there must be a surrender of its charter to, and acceptance by, the State, or judgment of dissolution. *Allen v. N. J. Southern R. R. Co.*, 49 How. 14. And a number of cases are cited to sustain the proposition. However, in *Webster v. Turner*, 12 Hun, 264, at General Term, it is said, all concurring, that when a corporation, with the consent and approval of all its stockholders, sold its entire property and effects with the intent and for the purpose of discontinuing the business of the corporation, and declared itself dissolved, did no business afterward, held no meetings and owed no debts, these acts were equivalent to a surrender of its corporate rights, citing numerous cases. And in *Erwin v. The Oregon Steam Navigation Co.* 22 Hun, 598, it is

held that the only effect of a resolution dissolving a corporation would be to deprive the corporation of the power of engaging in new business, and to leave it clothed with full power, so far as necessary, to close up all its affairs, pay all its debts and distribute its property. It is held in *Denike v. N. Y. & R., etc., Co.*, 80 N. Y. 599, that all the stockholders uniting might undoubtedly surrender the franchises of the corporation and work its dissolution, but that a portion of them cannot do so in the absence of statutory authority.

§ 2420. If a corporation, created under a general statute of the State for the formation of corporations, has an even number of trustees or directors, who are equally divided respecting the management of its affairs, and the entire stock of the corporation is, at that time, owned by the trustees or directors, or is so divided that one-half thereof is owned or controlled by persons favoring the course of one-half of the trustees or directors, and one-half by persons favoring the course of the other half of them, the trustees or directors, or one or more of them, may present a petition as prescribed in the last section. But this section does not apply to a savings bank, a trust company, a safe deposit company, or a corporation formed to rent safes in burglar and fire-proof vaults, or for the construction or operation of a railroad, or for aiding in the construction thereof, or for carrying on the business of banking or insurance, or intended to derive a profit from the loan or use of money.

§ 2421. The petition must show that the case is one of those specified in the last two sections, and must state the reasons which induce the petitioner or petitioners to desire the dissolution of the corporation. A schedule must be annexed to the petition, containing the following matters, as far as the petitioner or petitioners know, or have the means of knowing the same:

1. A full and true account of all the creditors of the corporation and of all unsatisfied engagements entered into by, and subsisting against, the corporation.
2. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.
3. A statement of the sum owing to each creditor or other person specified in the last subdivision, and the nature of each debt, demand or other engagement.
4. A statement of the true cause and consideration of the indebtedness to each creditor.
5. A full, just and true inventory of all the property of the corporation, and of all the books, vouchers and securities relating thereto.
6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge or otherwise.
7. A full, just and true account of the capital stock of the corporation, specifying the name of each stockholder, his residence, if it is known; or if it is not known, stating that fact; the number of shares belonging to him, the amount paid in upon his share, and the amount still due thereupon.

Under the former statute it was held that the petition should contain a statement of the books, vouchers and securities, relating to the corporation, of the incumbrances on its property, the nature of the debt or demand due the several creditors, and the true cause and

consideration of such indebtedness; that the stock not issued to the stockholders named is still owned by or in the possession of the corporation, or that it has not been issued and the property should be fully described. Such an inventory and a full statement of the books, vouchers and securities relating to the property will be required for the benefit of the receiver. Where it appeared by the petition and proof that one-half of the shares of the corporate stock was owned by the petitioners, who were two of the trustees of the company proceeded against, and the other half was owned by individuals, appellants, and these parties differed concerning the management of the company, but it was not clearly stated why the company should be dissolved, the petition was held defective. *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429.

Precedent for Petition.

To the Supreme Court of the State of New York:

The petition of John B. James and John B. James, Jr., respectfully shows to this court:

That they are a majority of the directors, etc., of the James Cement Company, a corporation created by and under the laws of the State of New York, to-wit, by and under chapter 40, Laws of 1848, for the purpose of organizing companies for mining and mechanical purposes.

That they have discovered that the stock, effects and other property of said corporation are not sufficient to pay all just demands for which it was liable, or to afford a reasonable security to those who may deal with it; and that they deem it beneficial to the interest of the stockholders that the said corporation should be dissolved for the following reasons, to-wit (state them):

That the principal office of the said corporation is located in the town of Esopus, Ulster county, in this State.

That a schedule is annexed to this petition marked "A," containing the following matters as far as your petitioners know, or have the means of knowing the same (here insert the paragraphs numbered respectively, from 1 to 7, both inclusive, of the above section).

Wherefore your petitioners pray for a final order of this court dissolving the said corporation, as prescribed in title 11 of chapter 17 of the Code of Civil Procedure, and for such other and further relief as may be proper.

Dated *January 10*, 1887.

JOHN B. JAMES.

JOHN B. JAMES, Jr.

ULSTER COUNTY, ss.:

John B. James and John B. James, Jr., being severally duly sworn, each for himself, says that the matters of fact stated in the foregoing petition subscribed by them, and the schedule thereto annexed, and therein referred to, marked "A," are just and true so far as he knows or has the means of knowing the same.

(*Jurat.*)

(*Signatures.*)

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§ 2422. An affidavit, made by each of the petitioners, to the effect that the matters of fact, stated in the petition and the schedule, are just and true, so far as the affiant knows or has the means of knowing the same, must be annexed to the petition and schedule.

§ 2423. Where the petition is addressed to the Supreme Court, the papers must be presented at a term of that court, held within the judicial district, embracing the county wherein the principal office of the corporation is located. In a case specified in section two thousand four hundred and twenty of this act, the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the case is one of those specified in section two thousand four hundred and nineteen of this act, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than three months after the granting of the order, why the corporation should not be dissolved. The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the court, or, in the Supreme Court, with the clerk of the county where the principal office of the corporation is located.

A receiver cannot be appointed on granting the order to show cause, nor can an injunction be granted restraining creditors from enforcing their demands. *Matter of Edson, etc., Co.*, 1 Law Bull. 51; *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557; *Matter of French Mfg. Co.*, 12 id. 488; *Kingsley v. First National Bank of Bath*, 31 id. 329. The order to show cause is process for the purpose of bringing interested persons before the court and there must be a strict compliance with the statutory provisions where the only requirement of the order was that persons interested "show cause why the prayer of the petition should not be granted," it was held to be neither in substance or effect what the law required. That as the Code required every person interested to be apprised of the fact that the proceeding was to dissolve the corporation and the order failed to give such information, the proceeding was void for lack of jurisdiction and that the objection might be taken by any party to the proceeding at any stage thereof. *Matter of Pyrolusite Manganese Co.*, 29 Hun, 429.

Precedent for Order.

(Caption.)

SUPREME COURT.

In the Matter of the Voluntary Dis-
solution of The James Cement Com-
pany.

On reading and filing the petition of John B. James and John B. James, Jr. as trustees of the James Cement Company, a domestic

corporation, created under the law of this State, having its principal office located at the town of Esopus, Ulster county, this State, and the schedule thereto annexed, duly verified by the petitioners on the 10th day of January, 1887, and on motion of L. B. Van Gasbeek, of counsel for the petitioners,

Ordered, that all persons interested in said corporation show cause, before this court, before W. S. Fredenburgh, Esq., who is hereby appointed referee for that purpose, at his office No. 30 John street, in the city of Kingston, N. Y., on the 5th day of May, 1887, at ten o'clock in the forenoon of that day, why the said corporation should not be dissolved. And it is further ordered that a copy of this order be published at least once in each week of the three weeks immediately preceding the said 5th day of May, 1887, in the *Kingston Daily Leader* and the *Kingston Argus*, newspapers published in the city of Kingston, in the county of Ulster, wherein this order is entered.

A. B. PARKER,

Justice Supreme Court.

§ 2424. A copy of the order must be published, as prescribed therein, at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in the newspaper printed at Albany, in which legal notices are required to be published; and also in one or more newspapers, specified in the order, published in the city or county wherein the order is entered.

It is said in *Matter of Westchester Iron Co.*, 15 How. 7, n., that the order should be published in the county where the principal office is situated.

§ 2425. A copy of the order must also be served upon each of the persons, specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made, either personally, at least twenty days before the time appointed for the hearing; or by depositing a copy of the order, at least forty days before the time so appointed, in the post-office, inclosed in a post-paid wrapper, addressed to the person to be served, at his residence, as stated in the schedule.

§ 2426. At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts. If a referee was not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable. The decision of the court, or the report of the referee, must be in writing, and must be made and filed with all convenient speed. It must contain a statement of the effects, credits, and other property, and of the debts and other engagements, of the corporation, and of all other matters, pertaining to its affairs.

In the report of the referee a statement that the schedules annexed to the petition are correct is not a compliance with this section. *Matter of Pyrolusite Manganese Co.*, *supra*. On the hearing the question as to whether the proceedings are being taken in bad faith and for fraudulent purposes and with intent to defraud

the stockholders can be determined, and the dissolution can be opposed upon those grounds. *Jewett v. Swan*, 19 Week. Dig. 144.

Precedent for Referee's Report.

(*Title, proceeding as in order.*)

To the Supreme Court of the State of New York.

I, the undersigned, the referee to whom a reference was made by an order of this court, made at a Special Term thereof, held, etc., at, etc., on the 20th day of January, 1887, requiring all persons to show cause before me at, etc., on, etc., why the James Cement Company should not be dissolved, do hereby respectfully report:

That due proof having been made by affidavit which is hereto annexed of the publication of said order as thereby required, I proceeded, at the time and place last aforesaid, to a hearing of the matters so referred, being attended by L. B. Van Gasbeek, Esq., the counsel for the petitioner, and also by S. B. Sharpe, attorney for John B. Walker, a stockholder. That I thereupon heard the proofs and allegations of the said parties, and took the testimony in relation to the matters set forth in said petition, and also in regard to such other matters and things pertaining to the affairs of said corporation as were brought before me, which testimony, duly subscribed by the respective witnesses, and certified by me, is hereto annexed.

I further report that the schedule "A," annexed to said petition, is just and true, with the exception of several items of personal property contained in the additional schedule hereto annexed, marked "F," which I find belongs to said corporation, and are to be added to said schedule, and with the exception of several debts of the said corporation, proved before me and not entered on said schedule, and which are contained in the additional schedule hereto annexed, marked "G," which shows the name of each of said creditors, the sum due him, his place of residence, the nature of the debt and the true cause and consideration of the indebtedness, and I find and determine the facts relating to said corporation accordingly.

And I further report that the following is a statement of the effects, credits and other property, and of the debts and engagements of the said corporation, and of all other matters pertaining to its affairs, viz.: (state them.)

I return herewith the said original petition and the schedules annexed thereto, which has been transmitted to me for use upon such hearing by the clerk of Ulster county, upon my written order, and are annexed to this, my report, and made a part thereof

All of which is respectfully submitted.

Dated *March 10*, 1887.

W. S. FREDENBURGH,
Referee.

§ 2427. The court or the referee is entitled to use, upon the hearing, the original petition, and the schedules annexed thereto; and the clerk must transmit them accordingly, upon the written order of the judge, or of the referee. In that case, they must be returned with the decision or report.

§ 2428. Where the hearing is before a referee, a motion for a final order must be made to the court, upon notice to each person who has made himself a party to

the proceedings, by filing with the clerk, before the close of the hearing, a notice of his appearance, in person or by attorney, specifying a post-office within the State, where such a notice may be served. The notice may be served as prescribed in this act, for the service of a paper upon an attorney in an action. Where the hearing was before the court, a motion for a final order may be made immediately, or at such a time and upon such a notice, as the court prescribes.

§ 2429. Upon an application for a final order, if it appears to the court, in a case specified in section two thousand four hundred and nineteen of this act, that the corporation is insolvent, or, in a case specified either in that section, or in section two thousand four hundred and twenty of this act, that, for any reason, a dissolution of the corporation will be beneficial to the interests of the stockholders, and not injurious to the public interests, the court must make a final order, dissolving the corporation, and appointing one or more receivers of its property. Upon the entry of the order, the corporation is dissolved. The court may, in its discretion, appoint a director, trustee, or other officer, or a stockholder of the corporation, a receiver of its property.

The act of 1870, providing that a receiver of a corporation other than a manufacturing corporation could only be appointed in a civil action, manifestly referred to a corporation in existence, and not to one which is dissolved, and in such case a receiver may be appointed on the application of either the trustees or a creditor. *Matter of Pontius*, 26 Hun, 232. As to when action can be maintained to dissolve corporation on account of violent dissensions and irreconcilable differences among the members, see *Fischer v. Raab*, 57 How. 87. On the dissolution of a corporation the trustees must convert the assets into money. They cannot invest them in stock of another corporation without the consent of all the stockholders. *Frothingham v. Barney*, 6 Hun, 366. Where a corporation is dissolved because the trustees cannot agree the court may, after the payment of the liabilities and expenses of the receivership, order a sale and distribution of the remaining assets. *Ex parte Woven Tape Skirt Co.*, 8 Hun, 508. The title of the receiver does not vest till his bond is filed, and a creditor may obtain a lien by judgment or attachment between the appointment and filing of the bond. *Chamberlain v. Rochester, etc., Co.*, 7 Hun, 557. See *Matter of Eagle Iron Works*, 8 Paige, 385; *Matter of Berry*, 26 Barb. 55. Mr. Bliss in his Annotated Code calls attention to the fact that sections 66 to 89 (2 R. S. 468) relating to receivership, are excepted from the Repealing Act of 1880, chapter 245, and made applicable to this section, and quotes the section and cites a number of authorities where action has been brought by stockholders or in the name of the people, bearing on these sections. On the voluntary dissolution of a corporation its officers are not prohibited from being appointed receivers. *Matter of Eagle Iron Works*, 8 Paige, 385.

Precedent for Order Dissolving Corporation.

At a Special Term of the Supreme Court, held in and for the State of New York, at the court-house in the city of Kingston, on the 20th day of June, 1887:

Present — Hon. Alton B. Parker, *Justice*.

SUPREME COURT.

In the Matter of the Voluntary Dissolution of The James Cement Company.

Upon reading and filing the report of W. S. Fredenburgh, Esq., referee, duly appointed herein by an order of this court, made at a Special Term thereof, held at the court-house in the city of Albany, dated, etc., with notice of motion for a final order thereupon, and upon all the papers and proceedings herein, with proof of due service as required by law and as therein required, of the order to show cause, made herein, on the 20th day of June, 1887, and of due service of said notice upon each person who has made himself a party to these proceedings by filing with the clerk before the close of the hearing before the referee, a notice of his appearance as required by law, and upon the attorney-general, and it appearing to the court that the said James Cement Company is insolvent, that it will be beneficial to the interests of the stockholders and not injurious to the public interests for the following reasons, viz.: (state them.)

It is hereby ordered that the said James Cement Company be, and the same is, hereby dissolved, and that Amasa Humphrey, banker, of the city of Kingston, Ulster county, be, and he is hereby, appointed receiver of the property thereof, upon executing, acknowledging and filing with the clerk of this court a bond, in the form required by law, to the people of this State, in the penalty of \$20,000, with two sufficient sureties, to be approved by a justice of this court, conditioned for the faithful discharge of his duties as such receiver.

And it is further ordered, that said receiver be empowered to take immediate charge of, and sell at his discretion, at public or private sale, the said property and assets of said company, and to collect the debts due to said company.

And it is further ordered, that both the plaintiff and defendant be, and they hereby are, enjoined from in any way using, controlling, interfering with or incumbering said company property, and from collecting any debts due said company, or paying out any moneys belonging to said company, until the further order of this court.

Enter in Ulster county.

A. B. PARKER, *Justice*.

§ 2430. A sale, assignment, mortgage, conveyance or other transfer of any property of a corporation, made after the filing of a petition as prescribed in this title, in payment of, or as security for, an existing or prior debt, or for any other consideration, or a judgment thereafter rendered against a corporation by confession, or upon the acceptance of an offer, is absolutely void as against the receiver appointed in the special proceeding, and as against the creditors of the corporation.

This section is similar to section 71 in statute cited under last section, and it was held in *Sands, Receiver, v. Hill*, 55 N. Y. 18, that the word "transfer," in that statute, means a passing over to another of an existing right to the thing transferred, which right shall survive the transfer. It does not include, and the inhibition of the statute does not apply, to the extinguishment or satisfaction of a chose in action, either by payment in full or by part payment which is taken in full satisfaction. It seems it was not the object of the section to debar the corporation from collecting debts due it, but it was intended to prohibit transactions designed to favor one or more creditors, or to give them a preference over others. The rule that insolvent corporations cannot, directly or indirectly, prefer their creditors, is reiterated in *Smith v. Danzig*, 64 How. 320; and *Harris v. Thompson*, 15 Barb. 62, and *Sibell v. Remsen*, 33 N. Y. 95, are cited in support of the proposition.

§ 2431. [*Amended*, 1884.] This title does not apply to an incorporated library society, to a religious corporation or to a select school or academy incorporated by the regents of the university or by the Legislature, or to a municipal or other political corporation. In the case of corporations affected by the provisions of this title and not having stockholders, it shall be sufficient for the purposes of this title to notify, name and refer to the "members" of such corporation instead of "stockholders," as herein provided.

CHAPTER XXIV.

PART I.—PROCEEDINGS SUPPLEMENTARY TO AN EXECUTION. THE EXAMINATION.

It is said by the codifiers that the chapter of the Code of Civil Procedure relating to this matter, in consequence of the numerous amendments interjected after its enactment, is singularly involved and confused (which they apparently deem quite exceptional), and that in order to remove the obscurities of expression and supply its deficiencies, it has been entirely rewritten. It will be found, however, that but few changes of substance have been made, but some new provisions have been added, a few omitted, and many rearranged. As to whether the present statute applies to examination under judgments recovered before September 1, 1880, the decisions are conflicting. *Baldwin v. Perry*, 1 Civ. Pro. 39 n.; affirmed, p. 118, holding the rule in opposition to *Bean v. Tonnele*, 24 Hun, 353; while in *Armstrong v. Cummings*, 2 Law Bull. 94, the execu-

tion was returned after September 1, 1880, on a judgment recovered before that date.

§ 2432. This title provides for three distinct remedies, as follows:

1. An order made or a warrant issued against a judgment debtor, after the return of an execution.
2. An order made or a warrant issued against a judgment debtor, after the issuing and before the return of an execution.
3. An order made after the issuing and either before or after the return of an execution, against a person who has property of the judgment debtor, or is indebted to him.

The proceedings under subdivision third of this section may be pursued, either alone or simultaneously with the proceedings under either subdivision first or subdivision second.

To these provisions must be added those of chapter 361, Laws of 1867, as amended by chapter 446, Laws of 1879, and chapter 640, Laws of 1881, by virtue of which taxes of over \$10 in amount may be collected by supplementary proceedings. The proceedings under these acts may be taken by the supervisor of the town or ward or county treasurer, or by the president of a village, as to a village tax, within one year after return of the tax, before the county judge, or special county judge of the county. The act, by its terms, applies to all villages, whether incorporated by special act or under the general acts. This section of the Code is in accordance with the decision in *Gibson v. Haggerty*, 37 N. Y. 553, holding the several proceedings to be independent and superseding a long line of conflicting decisions. The same rule was held in *National Bank of Rome v. Dering*, 8 Week. Dig. 261.

§ 2433. Each of those remedies is a special proceeding. But an order, made in the course thereof, can be reviewed only as follows:

1. An order, made by a judge, out of court, may be vacated or modified by the judge who made it, as if it was made in an action; or it, or the order of the judge vacating or modifying it, may be vacated or modified, upon motion, by the court out of which the execution was issued.
2. Where the execution was issued out of a County Court, an appeal from an order, made in the course of the proceedings, may be taken in like manner, as if the order was made in an action brought in the same court.

The language of the section settles a question long mooted in the courts under the former Code, as to whether the remedy is an action or a special proceeding, and renders obsolete the decisions in a large number of cases. As to the view taken of the former statute by the Court of Appeals, see *Wright v. Nostrand*, 94 N. Y. 31. Since the Code has changed these proceedings, from proceedings in an action to special proceedings, the debtor cannot be made to execute an assignment of lands out of the State in proceedings before a county

judge. The provision as to the mode of review is said by the codifiers, in their report to the legislature, to be intended to conform to the decision in *West Side Bank v. Pugsley*, 47 N. Y. 368. It was held in *Bassett v. Wheeler*, 84 id. 466, a proceeding for the collection of a tax, that it is competent for a person against whom supplementary proceedings have been instituted, *ex parte*, to move for the dissolution of the order for appearance and examination, on the ground that it was improvidently granted.

Appeals.—The following decisions were made under the former Code: An appeal lies from an order made by a county judge in an action originating in a Justice's or County Court. *Crounse v. Whipple*, 34 How. 333. The appeal can be heard only at General Term in the district where the venue is laid and judgment-roll filed. *Mallory v. Gulick*, 15 Abb. 307, *n.*; *Gould v. Torrance*, 19 How. 560. An appeal may be taken from an order vacating an order for the examination of the judgment debtor. *Hawes v. Barr*, 7 Robt. 452; *Conway v. Hitchins*, 9 Barb. 378. And an order dismissing proceedings to compel an appearance for examination is appealable to the General Term as affecting a substantial right. *Holstein v. Rice*, 15 Abb. 307. On appeal, objections to the preliminary affidavits, or to the regularity of the execution, will not be entertained unless it appears they were taken below. *Union Bank v. Sargeant*, 53 Barb. 452. If the appeal is from an order requiring payment of the judgment the whole case is open. *Crouse v. Wheeler*, 33 How. 337. An appeal with security to stay proceedings suspends the proceedings, but does not authorize a dismissal. *Cowdry v. Carpenter*, 17 Abb. 107. But an appeal without a stay does not prevent enforcing payment. *Arnoux v. Homans*, 32 How. 382. Where there is no stay the debtor may be punished for violation of the order even though it is reversed on appeal. *Woolf v. Jacobs*, 36 N. Y. Super. 408.

§ 2434. [*Amended, 1861 and 1884.*] Either special proceeding may be instituted before a judge of the court out of which, or the county judge, the special county judge, or the special surrogate of the county to which the execution was issued, or where it was issued to city and county of New York, from a court other than the Marine Court of that city, before a judge of the Court of Common Pleas for that city and county. Where the execution was issued out of a court other than the Supreme Court, and it is shown by affidavit that each of the judges before whom the special proceeding might be instituted, as prescribed by this section, is absent from the county, or for any reason unable or disqualified to act, the special proceedings may be instituted before a justice of the Supreme Court. In that case, if he does not reside within the judicial district embracing the county to which the execution was issued, the order made or warrant issued by him must

be returnable to a justice of the Supreme Court residing in that district, or the county judge, or the special county judge, or special surrogate of that or an adjoining county, as directed in the order or warrant.

The proceedings are before a judge and not in court. *Webber v. Hobbie*, 13 How. 382; *Miller v. Bowman*, 15 id. 10; *Butting v. Vanderburgh*, 17 id. 80. The order may be made at chambers, and entitling the order at Special Term does not make it void. *Hulsaver v. Wiles*, 11 How. 446; *Dresser v. Van Pelt*, 15 id. 19. A general stay should not be granted by a judge other than the one before whom the proceeding is pending. *Bank of Genesee v. Spencer*, 15 How. 14. It was held at an early date, under the old Code, that the proceedings might be entitled in the action. *Davis v. Turner*, 4 How. 190. And that practice has been followed almost without question or criticism under the present Code, despite the fact that it has now become settled that it is a special proceeding. It is, however, held in *Milliken v. Thompson*, 8 State Rep. 106, that proceedings supplementary to execution are not a part of an action, and the order should not be entitled in the action. It is said in *Bingham v. Disbrow*, 37 Barb. 24, that any justice of the Supreme Court may make an order on the judgment of that court, without regard to his residence or location. But in *Browning v. Hayes*, 41 Hun, 382, it is held that a non-resident debtor cannot be taken out of the county where his place of business is located. When an order is made by a justice of the Supreme Court to examine a judgment debtor in another judicial district, the order must be made returnable before a judge in that district, and the words, "in that case," in section 2434, do not alone refer to orders made for inferior judges, but are intended to embrace all orders to be made "before a justice of the Supreme Court."

The order is within the jurisdiction of the judge of the county to which execution has been issued. *Miller v. Adams*, 7 Lans. 131; affirmed, 52 N. Y. 409. And a county judge cannot make an order to examine a third party on a judgment of the Supreme Court unless execution has been issued to the county of such judge. *Terry v. Hultz*, 39 How. 169. Although a transcript has been filed, it was held that the Marine Court had jurisdiction to take supplementary proceedings. *Holbrook v. Orgler*, 49 How. 289. A justice of the Supreme Court has power to entertain proceedings on a judgment of that court. *Baldwin v. Perry*, 25 Hun, 72; reversing 1 Civ. Pro. 32. All the proceedings on a judgment of the Supreme Court may be had before a justice of that court anywhere in the State, except the attendance and examination of the

party proceeded against. *Crouse v. Wheeler*, 33 How. 337; *Bingham v. Disbrow*, 37 Barb. 24. The order may require the party proceeded against to appear at a time and place specified before the justice who makes the order, "or some other justice of this court at chambers." *Bank for Savings v. Hope*, 8 Daly, 316. The warrant to arrest the debtor may be made by a judge at chambers residing in the same judicial district, although not in the same county as the debtor, but it is said that this power should not be exercised in a case where the judgment debtor resides in a distant county, unless to prevent a failure of justice. The referee appointed may reside in a different county from that of the debtor. *Wilson v. Andrews*, 9 How. 39. Where the order is to appear before a referee, and he is absent, an order to appear before another referee, obtained from another judge, is irregular. The judge who granted the first order could have named another referee or changed the time of hearing. *Allen v. Starring*, 26 How. 57. Upon an order made in County Court to vacate an order, in supplementary proceedings made by the county judge requiring the judgment debtor to appear before a referee, the court has not power, upon denying the motion, the return day of the original order having passed, to direct the debtor to appear before the referee at a subsequent day and to be examined, as jurisdiction to make the order for the examination is vested in the judge and not in the court. *Douglass v. Mainzer*, 40 Hun, 75. But on the other hand in apparent conflict with this holding, see Special Term decision in *Joyce v. Spaford*, 9 Civ. Pro. 342. Where a transcript of a judgment of a justice in Brooklyn was filed in the office of the county clerk of Kings and a transcript filed in the office of the clerk of New York county, *held*, that an execution was properly issued to the sheriff of New York and made returnable to the clerk of Kings, and supplementary proceedings were properly taken in the Common Pleas. *Strybing v. Hicks*, 2 Law Bull. 6. See, also, as to the jurisdiction of Common Pleas on judgment of District Court, *Haurie v. Veeghtlin*, 5 Law Bull. 38. The provisions of this section are the subject of judicial construction in *Baldwin v. Perry*, 25 Hun, 71. And it is there said that the system of this section is plain; that it confers power to institute supplementary proceedings. *First*. Before any judge of the court out of which the execution issued. *Second*. Before any county judge or special county judge of any county to which execution was issued. *Third*. Before any judge of the Court of Common Pleas in and for the city of New York, where the execution

was issued to that county, out of any court other than the Marine Court. *Fourth.* To provide for cases where the execution is issued out of a court other than the Superior Court, and each of the judges before whom the special proceedings might be instituted as previously prescribed in the section, is absent from the county, or for any reason unable or disqualified to act, by authorizing the proceedings in such cases to be instituted before a justice of the Supreme Court, and directing where the subsequent steps in the proceeding shall be taken, in cases in which the party proceeded against, does not reside in the judicial district embracing the county to which execution was issued. The court adds that all these provisions are harmonious and consistent with each other, and offer no occasion for reasonable doubt.

§ 2435. At any time within ten years after the return, wholly or partly unsatisfied, of an execution against property, issued upon a judgment, as prescribed in section two thousand four hundred and fifty-eight of this act, the judgment creditor, upon proof of the facts, by affidavit, or other competent written evidence, is entitled to an order, requiring the judgment debtor to attend and be examined concerning his property, at a time and place specified in the order.

The return.—The execution must be actually returned before proceedings can be taken under the first subdivision, and the remedy on the execution should be really exhausted. *Engle v. Bonneau*, 2 Sandf. 679; *Livingston v. Cleaveland*, 5 How. 396; *Sackett v. Newton*, 10 id. 560; *Fenton v. Flagg*, 24 id. 499; *Tyler v. Whitney*, 33 Barb. 327. But the sheriff need not keep the execution sixty days, he may return it at any time within that period, and proceedings may be taken thereon at once. The sheriff is presumed to have done his duty in searching for property. *Field v. Chapman*, 15 Abb. 434; *Hart v. Stearns*, 4 Week. Dig. 540; *First Nat. Bank of Rome v. Dering*, 8 id. 261. This is the rule even though the sheriff was notified the debtor had property. *Stoors v. Kelsey*, 2 Paige, 418. And it is immaterial whether the return was at the request of the creditor, or not, unless the sheriff has by collusion made a return without any *bona fide* attempt to find goods subject to levy. *Forbes v. Waller*, 25 N. Y. 430. Although several of the Supreme Court decisions have held the contrary doctrine, they must be regarded as overruled by this case. The return of the sheriff cannot be impeached collaterally, only by motion to set it aside. *Sperling v. Levy*, 10 Abb. 426; *Tyler v. Whitney*, 33 Barb. 327; *Owen v. Dupignac*, 9 Abb. 180. See also opinion of Judge Smith in *Forbes v. Waller*, *supra*, and *Wright v. Nostrand*, 94 N. Y. 31.

Where the judgment creditor procured an order about two hours before the return was actually filed, having reason to suppose the return was actually filed, the fraction of a day was disregarded and the order held valid. *Jones v. Porter*, 6 How. 286. See *Blydenburgh v. Cotheal*, 5 id. 200, holding the same rule as to filing of judgment-roll and appeal therefrom. So the creditor was held entitled to an order where an execution was returned and a judgment-roll was afterward amended by reason of the reduction of the judgment without issuing another execution. *Sluyter v. Smith*, N. Y. Super., 1858, cited Bliss' Annotated Code, vol. 2, p. 555. In *Marx v. Spaulding*, 35 Hun, 478; S. C., 16 Abb. N. C. 309, the sheriff returned: "In pursuance of the demand of the plaintiff's attorneys I make the following return to the within execution; I have collected nothing under, and have not found any personal property out of which the said execution, or any part of the same, can be made; but I have thereunder levied on the real estate mentioned in the annexed notice of sale, and have advertised the same for sale, as in said notice provided; I have found no other property out of which to satisfy the same." This return was held insufficient to authorize the proceedings after return of execution. This case is said (Abbott's Annual, 1886) to have been affirmed by the Court of Appeals. However, in *Forbes v. Spaulding*, 52 N. Y. Super. 166; S. C., 8 Civ. Pro. 135, upon the same return, it was held that the execution was returned unsatisfied within the meaning of this section, and that plaintiff was entitled to an order for the examination of the defendant. Where process was only served on one partner and judgment and execution had against all, a return, *nulla bona*, held to exhaust the remedy. *Perkins v. Kendall*, 3 Civ. Pro. 240. Where it appeared more than sixty days had expired since issuing execution and the judgment remained unsatisfied, it was presumed the sheriff had done his duty and to have returned the execution. *Bean v. Tonnele*, 1 Civ. Pro. 33.

Within what time proceedings taken.—Proceedings supplementary may be taken immediately after due return of execution unsatisfied. *Engle v. Bonneau*, 2 Sandf. 679; *Livingston v. Cleveland*, 5 How. 396; *Forbes v. Waller*, 25 N. Y. 430. The limitation in the section to ten years renders obsolete *Owen v. Dupignac*, 9 Abb. 180; *Belknap v. Hasbrouck*, 13 id. 413; *Driggs v. Williams*, 15 id. 477. The latter case may, however, be regarded as authority for the proposition that if proceedings are legally instituted on a judgment before the lapse of twenty years from its recovery, they

do not abate upon the expiration of twenty years. Proceedings may be instituted within ten years after return of execution against property, though more than ten years have elapsed since the return of a former execution. *Levy v. Kirby*, 51 N. Y. Super. 69.

Who entitled to the remedy.—As to what judgments give the right to the remedy, see section 2458 and cases cited. The assignee of a judgment may take these proceedings, and this is true even though he take the assignment after return of execution. *Ross v. Olusman*, 3 Sandf. 676; *Frederick v. Decker*, 18 How. 96; *Orr's Case*, 2 Abb. 457; *King v. Kirby*, 28 Barb. 49; *Crill v. Kornmeyer*, 56 How. 276. The personal representatives of a deceased party may take the proceedings at any time within five years after the entry of judgment. *Collier v. DeRevere*, 7 Hun, 61; *Scott v. Durfee*, 59 Barb. 390, *n.* See § 1376 on this point. The judgment presumptively belongs to the executor of plaintiff, *Collier v. DeRevere*, *supra*, and the representative of a deceased creditor, in whose lifetime an execution was returned unsatisfied, may, on showing that fact and letters of administration, have an order. *Walker v. Donovan*, 53 How. 3. The representatives of a party whose right under the judgment and execution had been determined prior to September, 1880, when the repeal of section 183 of the old Code took effect, may institute proceedings without reviving the action. *Purdee v. Tilton*, 20 Hun, 76. An attorney who has a lien on a judgment for costs and interest may resort to supplementary proceedings, but the affidavit should show the fact of the lien. *Russell v. Somerville*, 4 Law Bull. 3. After the death of plaintiff the attorney who obtained the judgment has no authority to institute proceedings, they must be taken in the name of the personal representatives, otherwise they are void. *Amore v. LaMothe*, 5 Abb. N. C. 146.

A receiver of a corporation may institute proceedings in the name of the corporation after it has ceased to exist, and procure the appointment of a receiver of the judgment debtor's property. *Wright v. Nostrand*, 94 N. Y. 31. An attorney, employed to collect a claim, has power, by virtue of his original retainer, after he obtains judgment, to institute supplementary proceedings thereon, and to procure the appointment of a receiver. *Ward v. Roy*, 69 N. Y. 96. The ground on which this ruling is placed is that it is a proceeding in the suit. As it is now a special proceeding, possibly a different rule might be laid down. In *Moore v. Taylor*, 40 Hun, 56, without referring to the case just cited, and on the authority of

Lusk v. Hastings, 1 Hilt. 653, and *Egan v. Rooney*, 38 How. 121, it is said that the authority of the attorneys for plaintiff ceased on the entry of judgment, and after that plaintiff could employ another attorney without substitution, and the fact of a lien on the judgment does not entitle the attorneys to carry on the proceedings. A judgment creditor is not permitted to harass his debtor by successive examinations after he has once fully examined him; a second order will not be granted unless some good reason be given therefor, even though the second application be founded upon another judgment, held by the same creditor against the same debtor. *Canavan v. McAndrew*, 20 Hun, 46.

Who may be proceeded against.—The proceedings are authorized where the execution is against an infant judgment debtor. The regularity of the judgment cannot be inquired into collaterally. *Lederer v. Ehrenfeld*, 49 How. 403. But the proceeding cannot be taken against a foreign minister or consul. They are under the exclusive jurisdiction of the Federal courts. *Griffin v. Dominguez*, 2 Duer, 656. Nor against a corporation. *Hinds v. C. & R. R. Co.*, 10 How. 487; *Hammond v. H. R. Iron Co.*, 11 id. 29; *Sherwood v. Buffalo & N. Y. R. R. Co.*, 12 id. 136, and § 2463, Code of Civil Procedure. Nor against a trustee personally upon a judgment against him in his representative capacity. *In re Jung*, 16 Week. Dig. 563. At least not until it appears there is no fund that can be reached. *Felt v. Dorr*, 29 Hun, 14. Nor can a person maintain the proceedings against himself in a representative capacity. The proceedings are necessarily collusive and void. *Matter of Livingston*, 27 Hun, 607. And the proceedings cannot be maintained against a judgment debtor under arrest on an execution on the same judgment, since the taking of the body is, for the time being, a satisfaction of the judgment. *McGuinty v. Herrick*, 5 Wend. 240; *Chapman v. Hatt*, 11 id. 41; *Coopers v. Bigalow*, 1 Cow. 56.

The affidavit.—It is said in *Scott v. Durfee*, 59 Barb. 390, and *Collier v. De Revere*, 7 Hun, 61, that an affidavit is not necessary, but an affidavit is the usual written evidence on which the order is sought. The affidavit may be made by the judgment creditor, his attorney or agent. *Conway v. Hutchins*, 9 Barb. 378. The person making the affidavit must be in some way connected with the matter so as to know the facts, or the order will be set aside. *Frederick v. Decker*, 18 How. 96. The agent should show the nature of his agency. *Hawes v. Burr*, 7 Robt. 452. And if made by an assignee

the affidavit should show the fact. *Lindsay v. Sherman*, 5 How. 308. But an affidavit by one who describes himself as attorney of the plaintiff, without alleging that he is the attorney, is sufficient. *Miller v. Adams*, 52 N. Y. 409. The cases holding that proof was necessary to authorize the granting of order under old Code seem to be in point under this section. *People v. Oliver*, 66 Barb. 570; *Wegman v. Childs*, 44 id. 403; *Greene v. Bullard*, 8 How. 313. The proceedings cannot be maintained on an affidavit which does not correctly describe the judgment. This defect cannot be cured by amendment. *Kennedy v. Weed*, 10 Abb. 62. It must set forth that the judgment has been docketed, and that the transcript was filed before execution issued. *Hawes v. Burr*, 7 Robt. 452; *Simms v. Frier*, 2 Law Bull. 97. This, however, only on execution on judgment of an inferior court. *Bingham v. Disbrow*, 37 Barb. 24; *Kennedy v. Thorp*, 3 Abb. (N. S.) 131. But it need not allege specifically that the judgment is for more than \$25 if the fact appear. *Whitlock's Case*, 1 Abb. 320. Nor that the justice had jurisdiction if it shows the judgment is regular. *Conney v. Hitchins*, 9 Barb. 378. Whether it must state the execution was "against property." *McArthur v. Lansburgh*, 1 Code R. (N. S.) 211; *People v. Hulburt*, 5 How. 446. The rule requiring an averment that no previous application has been made for the order was not intended to apply to these proceedings. *Schanck v. Conover*, 56 How. 437; *Sayer v. McDonald*, 2 How. Pr. (N. S.) 119. But the rule is different in the Common Pleas. *Diossey v. West*, 1 Law Bull. 23. As to requisites in an application under chapter 640, Laws of 1881, see *In re Conklin*, 21 Week. Dig. 329. It need not appear by the affidavit that the judgment debtor has property. *Hatch v. Weyburn*, 8 How. 163. The papers should be entitled in the County Court, in proceedings on appeal from justice's judgment. *People v. Oliver*, 66 Barb. 570. Where the trustee of an express trust is chargeable with costs they are payable from the estate, and an affidavit in supplementary proceedings that an execution against his property "as assignee" has been returned unsatisfied is not sufficient, as it does not sufficiently appear that the execution directed the sheriff to satisfy the judgment out of the trust property held by the assignee, as required by section 1371. *Felt v. Dorr*, 29 Hun, 14. As to the rule when execution was returned under the old Code, as to averments conforming to that Code, see *Folwell v. Cambeis*, 14 Week. Dig. 115. Where an affidavit states the entry of a judgment in the clerk's office, and alleges that an execution was duly issued thereon

and delivered to the sheriff, it is sufficiently shown that such execution was issued out of a court of record. *Joyce v. Spafard*, 9 Civ. Pro. 342; appeal dismissed without opinion, 101 N. Y. 657. An affidavit for examination of a judgment debtor sufficiently shows the court in which the judgment was rendered where it is entitled in the Supreme Court, and states that the judgment "was rendered and perfected in this action." *Webster v. Sauen*, 3 How. (N. S.) 320. Where the affidavit states the filing of the transcript on the same day it will be presumed, in support of the proceedings, that the transcript was filed before the execution has issued. *Id.* The affidavit should specify the amount remaining unpaid, and although the omission to do so does not deprive the judge of jurisdiction to grant the order, it is an irregularity which furnishes good ground for the debtor's motion to set aside the order. *Douglas v. Mainzer*, 40 Hun, 75.

The order.—The general rule is that the order need not set out the facts requisite to give jurisdiction. *People v. Oliver*, 66 Barb. 570. A different rule is held in the Common Pleas. *Day v. Brosnan*, 6 Abb. N. C. 312. But if the order attempts to recite the facts it is said that it must recite them correctly, or the order will be set aside on application. *Hatch v. Weyburn*, 8 How. 163. Under the old Code, section 292, it was held that a non-resident of the State could only be required to be examined in the county where the judgment-roll was filed. *Anway v. David*, 9 Hun, 296. An order which states no place where the judgment debtor is to appear is fatally defective. *Kelty v. Yerby*, 31 How. 95. Where the order fails to name a justice in the district where the debtor resides it is said to be fatal if promptly raised. *Shultz v. Andrews*, 54 How. 376. An order requiring a debtor to appear "before me or some other justice of the court," etc., is not subject to objection on that account. The additional words are merely surplusage. *Bank for Savings v. Hope*, 8 Daly, 316; *Drener v. Van Pelt*, 15 How. 19. An order should not direct the proceedings to be sent to any other county than that in which the examination is had. *Pardee v. Tilton*, 20 Hun, 76. Where an order was made with the clause, "All subsequent proceedings shall be had before me," it was held this did not prevent any other officer having jurisdiction from granting an order against other parties based on the same judgment, that the phrase quoted should be construed to mean all subsequent proceedings under the same order. *First Nat. Bank v. Dering*, 8 Week. Dig. 261. It is irregular to require the debtor to appear before any judge other than

the one who makes the order, except as provided in the section. *Vibert v. Frost*, 3 Abb. 119; *Haggerty v. Rodgers*, 15 id. 314, *n.* An order returnable on Sunday is a nullity, and may be disregarded. *Arctic Fire Ins. Co. v. Hicks*, 7 Abb. 204. Two orders for examination of a judgment debtor, which he must obey, cannot be in force at the same time. If a debtor refuses to obey an order, and a second one is obtained, he cannot be punished for contempt for disobeying the first. *Gaylord v. Jones*, 7 Hun, 480; *Allen v. Starring*, 26 How. 57; *Brockney v. Brien*, 37 id. 270. Where a judgment was recovered fifteen years before the proceedings, and execution issued fourteen years before, proceedings could not be maintained on return of an execution issued without leave of court. *Belknap v. Hasbrouck*, 13 Abb. 418, *n.* Where an execution had been issued and returned ten years previously the order was held regular, though there was another execution outstanding not returned. *Owen v. Dupignac*, 17 How. 512.

The withdrawal of a proceeding by consent is no bar to subsequent order for examination. *Carter v. Clarke*, 7 Robt. 43. So where a motion to set aside an order has been granted, but no order entered thereon, no objection to a second order can be based on the pendency of the first proceeding. *Shultz v. Andrews*, 54 How. 376. No further orders should be made for examination unless it appears that the debtor has subsequently acquired property, or another execution been issued and returned, or new facts have come to the knowledge of the creditor. *Jurgenson v. Hamilton*, 5 Abb. N. C. 149; *Hamilton v. Morange*, 2 Law Bull. 58. The creditor must show facts to justify another examination, even where a judgment has been recovered on a former judgment. *Irwin v. Chambers*, 40 N. Y. Supr. 432; *Goodall v. Demarest*, 2 Hilt. 534; *Orr's Case*, 2 Abb. 457; *Grocers' Bank v. Bayaud*, 21 Hun, 203; *Selling v. McIntyre*, 5 Law Bull. 69; *Canavan v. McAndrew*, 20 Hun, 46. The rule that a judgment creditor will not be permitted to harass the debtor by repeated examinations does not apply where it does not appear that the first examination was concluded otherwise than by vacating the order authorizing it. *Methodist Book Concern v. Hudson*, 1 How. (N. S.) 517.

But an order should not be granted where an order of examination was outstanding based on another judgment between the same parties, there being no reference in the papers to the existence of such an order or allegation of newly-acquired property. *Cromwell v. Spofford*, 4 Civ. Pro. 273. A judge has power to direct a judge-

ment debtor to appear before a referee for examination. *Kaufman v. Thresher*, 10 Hun, 438.

Valid objections, when and how taken.—A party must appear in obedience to the order, unless there is an entire want of jurisdiction, and objections may be urged on the return day. *Shultz v. Andrews*, 54 How. 378; *Hilton v. Patterson*, 18 Abb. 245; *Arctic Fire Ins. Co. v. Hicks*, 7 id. 204; *Courtois v. Harrison*, 12 How. 359. The regularity of the judgment cannot be questioned in these proceedings. *Lederer v. Ehrenfeld*, 49 How. 403; *Saunders v. Hall*, 2 Abb. 418; *Courtois v. Harrison*, 1 Hilt. 109; *People v. Oliver*, 66 Barb. 570; *O'Neil v. Martin*, 1 E. D. Smith, 404; *Diossy v. West*, 8 Daly, 208. Nor can the validity of the execution be questioned. *Sanford v. Sinclair*, 8 Paige, 373; *Union Bank of Troy v. Sargeant*, 53 Barb. 422. But a stay may be granted the debtor to enable him to move to set aside the judgment or execution. *People v. Oliver*, 66 Barb. 570. And a stay was allowed one who was discharged in bankruptcy and had failed to set it up against the defendant. *World Co. v. Brooks*, 7 Abb. (N. S.) 212. The order should be vacated on proof of an insolvent's discharge. *Coursen v. Dearborn*, 7 Robt. 143; *Smith v. Paul*, 20 How. 97. The validity of the discharge cannot be tried in this proceeding. *Rich v. Salinger*, 11 Abb. 344; *Dresser v. Shufeldt*, 7 How. 85.

A debtor arrested on execution is deemed imprisoned while admitted to the jail limits, and while such imprisonment continues the right to supplementary proceedings is suspended. *Rothschild v. Quinzer*, 8 Abb. Dig. 802; *Hayes v. McCahill*, id. Under the old Code the proceedings could not be taken upon a judgment not *in personam*. *Bartlett v. McNeil*, 49 How. 55. As to what is necessary under present Code, section 2458 is explicit. The docket of a judgment of the United States court with the county clerk does not authorize the proceeding. *Tompkins v. Purcell*, 12 Hun, 662, cited with approval; *Goodyear Dental Vulcanite Co. v. Frisselle*, 22 id. 174. Questions as to the truth of the affidavit on which the order is made should be raised by a motion to set aside the proceedings; they cannot be first raised on a motion to commit for contempt. *Hilton v. Patterson*, 18 Abb. 245. Such motion to vacate or modify the order may be made on notice. *Lindsey v. Sherman*, 5 How. 308. If the execution is voidable the question must be raised in a direct proceeding for that purpose. *N. S. L., etc., Co. v. Pike*, 2 Law Bull. 31. Where the facts upon which the defendant claims a judgment in an action was paid, and the right to set off certain claims

the defendant had against the party was disputed, *held*, the proper remedy for defendant was by motion to have the judgment decreed satisfied of record. *Austin v. Byrnes*, 8 State Rep. 88. The presumption of payment of a judgment after lapse of twenty years does not operate to abate Supreme Court proceedings commenced before the lapse of that period. *Driggs v. Williams*, 15 Abb. 477. Appearance without objection waives irregularities. *Bingham v. Disbrow*, 37 Barb. 24; *Vibert v. Frost*, 3 Abb. 119; *Underwood v. Sutcliffe*, 10 Hun, 453; reversed on another point, 77 N. Y. 58. See, however, *Hinds v. Canaan R. R. Co.*, 10 How. 487; *De-Comeau v. People*, 7 Robt. 498. It is the duty of the debtor, in case of absence of the judge or referee, to wait a reasonable time for his arrival.

Form for Affidavit against Resident Debtor.

ULSTER COUNTY COURT.

Harrison Snyder

agst.

Solomon Bates.

ULSTER COUNTY, ss.:

Harrison Snyder, being duly sworn, says that on the 25th day of March, 1886, a judgment was rendered by the Supreme Court of the State of New York in favor of the said Harrison Snyder and against the said Solomon Bates, for \$520 damages and \$79 costs, and which said judgment is now owned by this deponent. That the judgment-roll thereupon was duly filed in the office of the county clerk of the county of Ulster, and said judgment was duly docketed in said clerk's office on the day last aforesaid. (Or, that a transcript thereof was duly filed, and said judgment was duly docketed, in the Ulster county clerk's office on the 25th day of March, 1886.)

That said judgment was rendered upon the said judgment debtor's appearance (or upon the personal service of the summons upon said Solomon Snyder), and was duly docketed on said 25th day of March, 1886, in Ulster county clerk's office. That an execution was duly issued upon said judgment out of said court on the 1st day of April, 1886, against the property of the said Solomon Bates, to the sheriff of the county of Ulster, where the said Solomon Bates resided (or has a regular place for the transaction of business in person) at the time of the commencement of this proceeding.

That said execution has, less than ten years since, and on the 26th day of June, 1886, been duly returned by said sheriff to the county clerk of the county of Ulster, wholly unsatisfied, and that the whole amount of said judgment is still unpaid, together with interest thereon from the 25th day of March, 1886. That no previous application has been made for an order in this matter.

(*Jurat.*)

(*Signature.*)

Form for Order.

ULSTER COUNTY COURT.

Harrison Snyder

agst.

Solomon Bates.

Proof having been made to me by the affidavit of Harrison Snyder, that judgment was rendered by the Supreme Court of this State upon personal service of the summons in favor of said Harrison Snyder against the said Solomon Bates, for the sum of \$699, damages and costs, and the judgment-roll thereupon filed in the Ulster county clerk's office on the 25th day of March, 1886, and said judgment duly docketed in the Ulster county clerk's office on the 25th day of March, 1886, and that execution was duly issued thereupon on the 25th day of March, 1886, out of the Supreme Court, against the property of said Solomon Bates, to the sheriff of the proper county, and that said execution has been since duly returned by said sheriff, on the 26th day of June, 1886, to the Ulster county clerk's office, wholly unsatisfied, and that said judgment still remains wholly unsatisfied:

Now, on the application of Charles Davis, attorney for the said Harrison Snyder, I do hereby order that the said Solomon Bates is hereby required, pursuant to law, to attend before me, a justice of the Supreme Court, residing in the third judicial district, at, etc., on, etc., at ten o'clock in the forenoon, to be examined concerning his property.

And I do hereby enjoin the said Solomon Bates from making or suffering any transfer or other disposition of or interference with the property of the said Solomon Bates until further direction in the premises. (Or, as above to word "before" and from thence as follows: John F. Cloonan, who is hereby designated and appointed as re, ee for that purpose, at, etc., on, etc., at ten o'clock in the forenoon, to be examined concerning his property, and that said referee certify to me all the evidence and the other proceedings taken before him.)

(*Signature of Judge.*)

§ 2436. At any time after the issuing of an execution against property, as prescribed in section 2458 of this act, and before the return thereof, the judgment creditor, upon proof, by affidavit, or other competent written evidence, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, is entitled to an order requiring the judgment debtor to attend and be examined concerning his property, at the time and place specified in the order.

An affidavit, in the language of the statute, confers jurisdiction, but, as it states conclusions and not facts, it is irregular, it may be amended or the defect waived. It must show a demand of, and refusal by, the debtor to apply the property. *First National Bank v. Wilson*, 13 Hun, 232. And the order cannot be made unless the property is not subject to levy, or is so kept that it cannot, with due

diligence, be reached by execution. *Sackett v. Newton*, 10 How. 560. An affidavit which states as a ground for examination upon information and belief that the debtor unjustly refuses to apply property toward the satisfaction of the judgment, is insufficient; the affidavit should state the name of his informant, with his means of knowledge, and describe the property and also allege a demand. *Manken v. Pape*, 65 How. 453. The proceeding is purely statutory, and not in the course of the common law or one extending the remedial power of the court to collect its own judgment, and there must be proof of the material facts required to be stated or no jurisdiction exists. When the affidavit does not show that the debtor resides in the same county with the officer, but resides out of the State, having a place of business here, the officer does not get jurisdiction, notwithstanding the debtor's appearance. So held under the old Code, section 292. *Driggs v. Smith*, 47 How. 215.

The forms under § 2545, can be readily adapted to this section.

§ 2437. Upon proof entitling a judgment creditor to an order, under either of the last two sections; and also proof, by affidavit, to the satisfaction of the judge, that there is danger that the judgment debtor will leave the State, or conceal himself, and that there is reason to believe that he has property, which he unjustly refuses to apply to the payment of the judgment; the judge may, instead of making an order, issue a warrant under his hand, reciting the facts, and requiring the sheriff of any county, where the judgment debtor may be found, to arrest him, and bring him before the same judge, or before another judge, if the case is one where the warrant must be returnable to another judge.

This remedy may be had by the assignee of a judgment. *King v. Kirby*, 28 Barb. 49. It is necessary for the creditor, before he is entitled to a warrant of arrest against a debtor, to establish, to the satisfaction of the judge to whom the application for the warrant is presented, by affidavit, that there is danger the judgment debtor will leave the State or conceal himself, and there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment. Where the allegations in the affidavit on which the warrant is asked are stated to be upon belief, and the fact of defendant's having property is a mere inference of the plaintiff based upon the fact that defendant is a man of extravagant habits, etc., the affidavit is insufficient. *Netzel v. Mulford*, 59 How. 452. It is said in that case, citing the language of *The People v. Recorder of Albany*, 6 Hill, 429: In such cases, where the creditor may be his own witness for the purpose of procuring a warrant, and may choose his own time for arresting the debtor, it is not too much to require that in the first instance he should make out a plain case. Under the statute of 1831, similar in language, it was held there should be

proof of the facts authorizing the issuing of the warrant, and while it need not necessarily be in the form of an affidavit, it must be of such a character as to furnish evidence which, in the judgment of the officer, amounts to proof of the charge. *Vredenburg v. Hendricks*, 17 Barb. 179; *Broadhead v. McConnell*, 3 id. 175. To make a case for arrest by reason of anticipated concealment, it must appear or be presumable that the concealment will be within this State. Where it is shown that he is out of the State it will not be granted. *Roshand v. Waring*, 1 Abb. N. C. 311.

Form for Order of Arrest.

The People of the State of New York to the Sheriff of the County of Ulster :

WHEREAS, Proof has been made to me, by affidavit, that a judgment was heretofore and on the 25th day of March, 1886, rendered by the Supreme Court upon personal service of the summons in favor of Harrison Snyder and against Solomon Bates, for \$699 damages and costs, the judgment-roll whereupon was duly filed in the Ulster county clerk's office on the 25th day of March, 1886, and a transcript of which judgment was duly filed and said judgment duly docketed in the Ulster county clerk's office on the 25th day of March, 1886, and that an execution has been duly issued thereupon out of the Supreme Court to the sheriff of the proper county, on the 1st day of April, 1886, and that said execution has since, and on the 26th day of June, 1886, been duly returned by said sheriff to the Ulster county clerk's office wholly unsatisfied, and that said judgment still remains wholly unsatisfied. And also upon proof by affidavit to my satisfaction that there is danger that the said Solomon Bates will leave the State of New York or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of said judgment, to-wit: (Here recite facts as they appear in affidavit.)

You are hereby required to arrest the said Solomon Bates and to bring him before me, at, etc., on, etc., then and there to be dealt with according to law. And this shall be your warrant therefor.

Witness, etc.:

CHARLES DAVIS,
Plaintiff's Attorney.

A. B. PARKER,
Justice Supreme Court.

§ 2438. Where the facts specified in the last section are made to appear, as therein stated, at any time after the making of an order requiring the judgment debtor to attend and be examined, and before the close of his examination, the judge may issue a warrant, as therein prescribed; and, if necessary, may direct the adjournment, or, if the return day of the order has elapsed, the continuance of the proceedings under the order, until after the return of the warrant and his decision thereupon.

§ 2439. A warrant, issued as prescribed in the last two sections may be vacated or modified, as prescribed in section two thousand four hundred and thirty-three of this act, with respect to an order.

§ 2440. Where a judgment debtor has been arrested and brought before a judge, by virtue of a warrant, issued as prescribed in this article; and it appears,

to the satisfaction of the judge, from his examination or other proof, that there is danger that he will leave the State, or conceal himself, and that he has property which he has unjustly refused to apply to the satisfaction of the judgment; the judge may make an order requiring him to give an undertaking, with one or more sureties, in a sum fixed and within a time specified in the order, to the effect that he will, from time to time, as the judge directs, attend before the judge, or before a referee, appointed or to be appointed in the proceedings; and that he will not, until discharged from arrest by virtue of the warrant, dispose of any of his property, which is not exempted from seizure by section two thousand four hundred and sixty-three of this act. If he fails to comply with the order, the judge must, forthwith, by warrant, commit him to prison, there to remain until the close of the examination, or the giving of the required undertaking; except that the judge may direct the sheriff to produce him, from time to time, as required in the course of the proceedings.

Form for Undertaking.

Harrison Snyder

agst.

Solomon Bates.

WHEREAS, A warrant was issued by Hon. Alton B. Parker, Justice of the Supreme Court, etc., in the above-entitled action to the sheriff of Ulster county, pursuant to section 2437 of the Code of Civil Procedure, requiring the said sheriff to (state requirement of warrant); and

WHEREAS, The said Solomon Bates had been arrested and brought before said justice;

WHEREAS, It has appeared to the satisfaction of said judge, from the examination of said Solomon Bates, that there is danger that he will leave the State, or conceal himself, and that he has property which he has unjustly refused to apply to the satisfaction of the judgment mentioned in said warrant, and an order has thereupon been made by said judge dated July 5, 1886, requiring said Solomon Bates to give an undertaking within the time specified in said order:

Now, therefore, we, James Kline, of the city of Kingston, merchant, and George Hanley, of the town of Marbletown, merchant, do hereby jointly and severally undertake, pursuant to the said order and to the provisions of section 2440 of the Code of Civil Procedure, that said Solomon Bates will, from time to time, as the said justice directs, attend before said justice in these proceedings, and that he will not, until discharged from arrest by virtue of said warrant, dispose of any of his property which is not exempted from seizure by section 2463 of the Code of Civil Procedure.

(Add justification, acknowledgment and approval.)

§ 2441. Upon proof, by affidavit or other competent written evidence, to the satisfaction of the judge, that an execution against property has been issued, as prescribed in section two thousand four hundred and fifty-eight of this act, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned; and also that any person or corporation has personal property of the judgment debtor, exceeding ten dollars in value, or is indebted to him in

a sum exceeding ten dollars; the judgment creditor is entitled to an order, requiring that person or corporation to attend and be examined concerning the debt or other property, at a time and place specified in the order. The judge may, in his discretion, require notice of the subsequent proceedings to be given to the judgment debtor, in such a manner as he deems just. But a receiver shall not be appointed without such a notice; except as otherwise prescribed in article second of this title.

The case of *Brett v. Browne*, 1 Abb. (N. S.) 155, seems to be superseded as to the necessity for proof of value of property in hands of third person by language of the section fixing amount. The affidavit cannot be in the alternative, that the third person has property of the judgment debtor, or is indebted to him, etc. *Davis v. Henig*, 65 How. 94; *Lee v. Heirberger*, 1 C. R. 38. It must state the county in which the person sought to be examined resides, or, if a non-resident, where he has a place of business. *Foster v. Pierce*, 8 Abb. 407. This section seems to settle the question that the proceeding is independent of proceedings against the debtor, a controversy which much vexed the courts under the old Code. *McBride v. Farmers' Bank*, 28 Barb. 476; *Graves v. Lake*, 12 id. 33; *Kemp v. Harding*, 4 id. 178. The affidavit need not show that the person has property which he unjustly refuses to apply, etc. *Potts v. Davidson*, 1 How. (N. S.) 216. In *People v. Jones*, 1 Abb. N. C. 172, it was held allegations upon information and belief were insufficient on proceedings for contempt. But *Miller v. Adams*, 52 N. Y. 409, is authority for the proposition that an affidavit that the person whose examination is desired has property of the judgment debtor in his hands, or is indebted to him, as the deponent is advised and believes, is sufficient to confer jurisdiction upon the judge to grant the order, and it seems that such an affidavit meets all the requirements of the section, and would be held sufficient to sustain the order upon a direct proceeding to set it aside.

One who owes money, though not yet payable, may be summoned as a debtor to the judgment debtor. *Davis v. Hereig*, 65 How. 290. A third person, on whom the order is served, cannot disregard the order on the ground that the affidavit on which it was granted was insufficient. He must move to set it aside. *Wilcox v. Harris*, 59 How. 262. An execution creditor of a municipal corporation may have an order to examine a person indebted to, or having funds of, defendant; an officer of such corporation having funds in his hands may be examined. *Lowber v. Mayor*, 5 Abb. 268. Where a joint-stock association is sued in the name of its president or treasurer, that does not make him a defendant. He is subject to be examined on showing him to be indebted to the asso-

ciation. *Courtois v. Harrison*, 12 How. 359. Proceedings may be instituted for the examination of a third person after the examination of the debtor has ended and a receiver has been appointed. *Lockwood v. Worstell*, 15 Abb. 490, n., and examination may proceed and a receiver be appointed, though an attachment has issued against all the judgment debtor's property. *Hanson v. Tripler*, 3 Sandf. 733. But a receiver of a foreign corporation, appointed in another State, will not be subjected to an examination or required to pay over moneys due a judgment debtor. *Smith v. McNamara*, 15 Hun, 447. A bank holding funds of a bankrupt estate, as depository of the Bankrupt Court of the United States, was held, in supplementary proceedings upon a judgment against the assignee, not to be a corporation holding funds of the judgment debtor within the provision. *Havens v. National Bank*, 4 Hun, 131. The salary of the debtor cannot be reached by service of an order on his employer the day before it is due and payable. *First National Bank v. Beardsley*, 8 Week. Dig. 7. The rule as to whether or not notice shall be given to the judgment debtor was held differently in several cases under the former Code. *Holmes v. Jordan*, 15 Abb. 410, n.; *DeComeau v. People*, 7 Robt. 498; *Gibson v. Haggarty*, 37 N. Y. 555; *Lynch v. Johnson*, 48 id. 27.

Precedent for Affidavit.

SUPREME COURT.

John Binninger	}
<i>agst.</i>	
Joseph Hoag.	

COUNTY OF ULSTER, ss.:

John Binninger, of said county, being duly sworn, says that he is the above plaintiff; that judgment was rendered in this action against said Joseph Hoag, defendant above named, on the 24th day of January, 1887, for \$500 damages, and \$95.46 costs, upon the judgment debtor's personal appearance or personal service of the summons upon him, and the judgment-roll filed and judgment docketed on that day in the office of the clerk of the county of Ulster. That an execution thereon against the property of the said Joseph Hoag was issued and delivered on the 25th day of January, 1887, to the sheriff of the county of Ulster, where said Joseph Hoag then resided and still resides, and has an office for the regular transaction of business in person at Rosendale, Ulster county, N. Y. (if non-resident erase statement as to residence and add in blank the facts required by section 2458). That this said execution has been returned (add in blank facts required by section 2458). That such return was made within ten years

(if not returned erase this clause). That no previous application has been made for the order asked hereon. That Samuel Johnson, of the city of Kingston, Ulster county, N. Y., has property of said Joseph Hoag, and is indebted to said Joseph Hoag in an amount exceeding \$10. That said Samuel Johnson resides and has an office for the regular transaction of business in person at Kingston city, said county (if non-resident erase statement as to residence and add in blank the facts required by section 2458).

JOHN BINNINGER.

Subscribed and sworn to before me, {
this 4th day of June, 1887. }

M. S. DECKER, *Notary Public.*

Precedent for Order.

SUPREME COURT.

John Binninger
agst.
Joseph Hoag.

It appearing to me by the affidavit of Joseph Binninger, that judgment had been recovered in this action in favor of said Joseph Binninger, plaintiff above named, against said Joseph Hoag, the above defendant, rendered upon the judgment debtor's personal appearance, or personal service of the summons upon him for a sum not less than \$25 exclusive of costs, and that an execution against the property of the said Joseph Hoag, the judgment debtor in this action, has been duly issued to the sheriff of the proper county upon the judgment herein, and has been returned wholly unsatisfied; that said execution was so returned within ten years; and that Samuel Johnson, of the city of Kingston, Ulster county, N. Y., has property of the judgment debtor, and is indebted to him in an amount exceeding \$10:

I do hereby order and require the said Samuel Johnson to appear before Ashley W. Cooper, hereby appointed a referee for that purpose, at his office, 60 Wall street, in the city of Kingston, on the 9th day of June, 1887, at ten o'clock in the forenoon, to be examined and answer concerning the same. And the said Joseph Hoag and the said Samuel Johnson are hereby severally forbidden and enjoined from making or suffering any transfer or other disposition of, or interference with, the property of said Joseph Hoag not exempt from levy and sale by virtue of an execution, or the property or debt concerning which said Samuel Johnson is required to attend and be examined, until further direction in the premises.

Dated *the 4th day of June, 1887.*

WILLIAM S. KENYON,
Ulster County Judge.

§ 2442. An order, requiring a person to attend and be examined, made pursuant to any provision of this article, must require him so to attend and be examined, either before the judge to whom the order is returnable, or before a referee designated therein. Where the examination is taken before a referee, he must certify, to the judge to whom the order is returnable, all the evidence and the other proceedings taken before him.

§ 2443. At any stage of the proceedings, the judge to whom the order is returnable may, in his discretion, make an order, directing that any other examination, or testimony, be taken by, or that a question arising be referred to, a referee, designated in the order. Where a question is so referred, the referee may be directed to report either the evidence or the facts.

In support of an order to appear before a referee, it will be presumed that there was an order appointing a referee. *Lewis v. Penfield*, 39 How. 490. A justice of the Supreme Court may appoint a referee to hold sessions in any county in the State. He need not reside in the county of the party to be examined, or where the examination is taken. *Bingham v. Disbrow*, 37 Barb. 24; *Wilson v. Andrews*, 9 How. 39. If the referee dies or the proceeding fails for any reason, the judge before whom the proceedings are pending may appoint another referee. *Allen v. Starring*, 26 How. 57. Where the judge made an order substituting another referee in place of the one named in the original order, and directed the debtor to appear and answer before him at a time and place stated, it was held by the Court of Appeals that the judge had power to make the order, and whether he should exercise this power rested in his discretion, and the order was not reviewable there. *Pardee v. Tilton*, 83 N. Y. 623. The referee may be appointed *ex parte*, but if objectionable, application should be made to the judge who appointed him, to vacate the order. *Conway v. Hitchins*, 9 Barb. 378; *Hulsaver v. Wiles*, 11 How. 446; *Tremain v. Richardson*, 68 N. Y. 617. It is said in *Hollister v. Spafford*, 3 Sandf. 742, that when it becomes evident a protracted examination is likely to ensue a referee will be appointed. In practice in the city of New York, a referee is appointed, or the debtor is sworn by the judge, and he and counsel retire to another room for the examination. In most of the counties the county judge hears the examination, the creditor's attorney taking down the evidence. When the judge appoints a referee, but does not name the time or place for hearing, but merely directs the debtor to appear, as required by the referee, the referee may issue a summons for his appearance. And disobedience thereto is a contempt. *Redmond v. Goldsmith*, 2 Law Bull. 19. An order may direct a debtor to appear before a referee for examination, and before the judge on the Monday succeeding his examination; on that day a receiver may be appointed, whether the debtor appears or not, and if he fails to appear he may be put in contempt. *Sickles v. Hanley*, 4 Abb. N. C. 231. In proceedings before a referee discontinuance, or the imposition of costs, should not be had, or made before the report of the referee, and both parties should have notice

of any application founded on the report. *Kennedy v. Norcott*, 54 How. 87. A referee is not to prosecute the inquiry, but to take the evidence drawn out by plaintiff's counsel. *Korotowsky v. Leipzig*, 52 How. 410.

§ 2444. Upon an examination under this article, each answer of a party or witness examined must be under oath. A corporation must attend by, and answer under the oath of, an officer thereof; and the judge may, in his discretion, specify the officer. Either party may be examined as a witness, in his own behalf, and may produce and examine other witnesses, as upon the trial of an action. The judge or referee may adjourn any proceedings, under this article, from time to time, as he thinks proper.

The debtor must appear in person before the judge or referee, and mere presence is not sufficient if he does not answer when called. *People v. Wilgus*, 5 Den. 58. Either party, in the absence of the other, must wait a reasonable time, and where the debtor failed to wait a reasonable time for the judge, it was held the injunction ordered remained valid. *Reynolds v. McElhone*, 20 How. 454. The attendance of a witness is properly procured by a subpoena, issued out of the court in which the judgment is obtained, and disobedience to such subpoena should be tried and punished by the court. *People v. Dutcher*, 3 Abb. (N. S.) 151.

A witness appearing and being examined is bound to answer proper questions whether he has been subpoenaed or not. *People v. Marston*, 18 Abb. 267. Leading questions to the debtor are allowable. *Corning v. Tooker*, 5 How. 17. The debtor may be cross-examined on his own behalf. *Leroy v. Halsey*, 1 Duer, 589; *Sanford v. Carr*, 2 Abb. 462.

The provisions of the statute are intended to give authority for a full and complete examination of the debtor concerning the amount and value of his property, as well as to any disposition he has made or attempted to make of it. The creditor is entitled to examine his debtor once as fully as may be. *Forbes v. Willard*, 37 How. 193; S. C., 54 Barb. 520; *Canavan v. McAndrew*, 20 Hun, 46. Where a witness having been served with a subpoena *duces tecum* refused to produce certain papers on the ground that they related to his private affairs, it was held that it was for the court, on inspection, to decide as to the relevancy and materiality of the papers, that the creditor may make searching inquiry, and that an interested witness should be strictly dealt with. *Champlin v. Stoddard*, 17 Week. Dig. 76. Where it appears upon an examination that a judgment creditor has transferred property to a witness, the latter is bound to answer all questions touching the transfer, and seeking for informa-

tion bearing upon the question whether such transfer was for a good consideration, and was honest or fraudulent, and, upon his refusal to answer, he is liable to be punished as for a contempt. *Lathrop v. Clapp*, 40 N. Y. 328. If a third person, on examination, deny his indebtedness to the judgment debtor, the power of the court is at an end, except to forbid him to transfer any interest until the appointment of a receiver. The party cannot be compelled to make a more particular and specific answer. *Tompkins Co. Bank v. Trapp*, 21 How. 17. The defendant cannot be compelled to subscribe his name to the referee's minutes of his testimony if they contain a statement which is not strictly true, even though its falsity be shown by a supplementary entry in the minutes. If incorrect, the defendant is entitled to have them corrected to conform to his testimony. *Sherwood v. Dolan*, 14 Hun, 191. The referee may allow corrections to be made to the minutes after they are signed. *Corning v. Tooker*, 5 How. 16.

An examination in supplementary proceedings of a debtor who has made a general assignment should not be confined to property acquired since the assignment. It may include an inquiry concerning his property, legal or equitable, including property transferred to another with apparent intent to hinder, delay or defraud creditors. *Seligman v. Wallach*, 16 Abb. N. C. 317; *Schneider v. Altman*, id. 312. It seems the rule is different where an action has been brought to set aside the assignment. *Schloss v. Wallach*, 16 Abb. N. C. 319, *n.*; *Bacon v. Goldsmith*, 1 City Ct. 482. And, if the examining creditor has recognized the assignment, by proving his claim against the debtor, he cannot examine as to matters prior to the assignment. *Wilson Bro. Co. v. Daggett*, 9 Civ. Pro. 408. On an examination in supplementary proceedings, the creditor is not deprived of his right to a complete discovery of the facts by a claim of a witness that he is the owner, by purchase, of the property sought to be reached. The creditor may still show, if possible, that the purchase was not made in good faith. *Mechanics and T. Bank v. Healy*, 14 Week. Dig. 129; affirmed, 89 N. Y. 605. It is not necessary to swear the debtor or witness a second time on an adjourned examination. *Hudson v. Plets*, 11 Paige, 180. The power of the referee to examine further is spent on making his report. *Orr's Case*, 2 Abb. 457. But a judge has power to compel a further examination even after a receiver is appointed. *People v. Mead*, 29 How. 360. It is no ground for staying supplementary proceedings that a creditor's bill is pending between the parties.

The debtor may be inquired of as to the sources whence he acquired his property. *Forbes v. Willard*, 54 Barb. 520. In proceedings against a third party, the question of rights of the parties cannot be determined. *Dickinson v. Onderdonk*, 18 Hun, 479. But the inquiry extends to all property in the hands of such third party. *Brown v. Morgan*, 3 Edw. Ch. 278. An attorney will not be compelled to disclose information he has obtained from a judgment debtor in his professional capacity. *Graham v. People*, 63 Barb. 483; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 598; *Bacon v. Frisbie*, 80 N. Y. 394. A party or witness may be required to produce books and papers on the hearing. *Pruden v. Tallman*, 6 Civ. Pro. 360; *Holmes et al. v. Stietz*, id. 362; *Champlin v. Stoddard*, 17 Week. Dig. 76; *Bacon v. Frisbie*, 80 N. Y. 394. A subpoena in supplementary proceedings before a referee must be issued under the hand of the referee. *People v. Bale*, 2 Week. Dig. 275. It is said, in *Knowles v. DeLazare*, 8 Civ. Pro. 386; distinguishing *People v. Dutcher*, 3 Abb. (N. S.) 157, that a witness should be subpoenaed to attend in supplementary proceedings under section 863, and a subpoena in the usual form, signed by the clerk, is insufficient. Under the provisions of section 843, a referee in supplementary proceedings has power to administer an oath to a judgment debtor. So held in overruling demurrer to an indictment for perjury. *Abbott's Annual*, 1886, p. 339. The judgment debtor, by appearing and going on with examination, waives all but jurisdictional defects in the proceeding. *Utica Bank v. Buell*, 17 How. 498. A commission cannot issue out of the State to take the deposition of a witness in these proceedings. *Graham v. Colburn*, 14 How. 52; *Morrell v. Hey*, 24 id. 48. The referee has no right to adjourn the proceedings indefinitely without the consent of the debtor, but he should require plaintiff to proceed with all reasonable diligence. *Hudson v. Plets*, 11 Paige, 180. The referee has power, however, the same as a master in chancery had, as a necessary incident to the examination, and he may adjourn the proceedings from time to time against the objection of the debtor. *Kaufman v. Thrasher*, 10 Hun, 438. See *Mason v. Lee*, 23 How. 466; and *Allen v. Starring*, 26 id. 57; *Ammidon v. Walcott*, 15 Abb. 314; *Reynolds v. McElhone*, 20 How. 454; *Johnson v. Tuttle*, 17 Abb. 315; *Parker v. Hunt*, 15 id. 410, n., as to adjournments and what constitutes a valid adjournment. The parties may adjourn by consent. *Squire v. Young*, 1 Bosw. 690; *People v. Oliver*, 66 Barb. 570.

§ 2445. Unless the parties expressly waive the referee's oath, a referee, ap-

pointed as prescribed in this article, must, before entering upon an examination or taking testimony, subscribe and take an oath that he will faithfully and fairly discharge his duty upon the reference, and make a just and true report, according to the best of his understanding. The oath may be administered by an officer designated in section eight hundred and forty-two of this act, and must be returned to the judge with the report or testimony.

§ 2446. At any time after the commencement of a special proceeding authorized by this article, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, upon proof by affidavit, to his satisfaction, that a person or corporation is indebted to the judgment debtor, and upon such a notice, given to such persons, as he deems just, or without notice, make an order permitting the person or corporation to pay to a sheriff designated in the order, a sum on account of the alleged indebtedness, not exceeding the sum which will satisfy the execution. A payment thus made is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor, in good faith and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice when the payment was made.

§ 2447. Where it appears, from the examination or testimony taken in a special proceeding authorized by this article, that the judgment debtor has, in his possession or under his control, money or other personal property belonging to him; or that one or more articles of personal property, capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person, the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, and upon such a notice, given to such persons as he deems just, or without notice, make an order directing the judgment debtor or other person immediately to pay the money, or deliver the articles of personal property to a sheriff designated in the order, unless a receiver has been appointed or a receivership has been extended to the special proceeding, and in that case to the receiver.

Under this section the court is authorized, on the examination of a third party, to direct such person to pay over any money or property which he may have in his hands belonging to the judgment debtor, where there is no substantial dispute touching the possession or ownership of the property. *Bauer v. Betz*, 4 State Rep. 92. The question is whether the defendant has any property in his possession or under his control at the time of the commencement of the proceedings; to make the order without proof of ability to comply would be reviving, in another form, imprisonment for debt. *The Columbian Institute v. Cregan*, 3 State Rep. 287. The statute does not authorize the judge to order the application toward the payment, or the delivery or transfer to the receiver for such purpose, of any but personal property. *Smith v. Tozer*, 3 State Rep. 363.

§ 2448. If the sheriff to whom money is paid, or other property is delivered, pursuant to an order made as prescribed in either of the last two sections, does not then hold an execution upon the judgment against the property of the judgment debtor, he has the same rights and powers, and is subject to the same

duties and liabilities, with respect to the money or property, as if the money had been collected or the property had been levied upon by him by virtue of such an execution, except as otherwise prescribed in the next section.

§ 2449. After a receiver has been appointed or a receivership has been extended to the special proceeding, the judge must, by order, direct the sheriff to pay the money or the proceeds of the property, deducting his fees, to the receiver; or, if the case so requires, to deliver to the receiver the property in his hands. But if it appears, to the satisfaction of the judge, that an order appointing a receiver or extending a receivership is not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money so paid, or the proceeds of the property so delivered, upon an execution in favor of the judgment creditor, issued either before or after the payment or delivery to the sheriff.

§ 2450. Where money is paid, or property is delivered, as prescribed in the last four sections, and afterward the special proceeding is discontinued or dismissed, or the judgment is satisfied without resorting to that money or property, or a balance of the money, or of the proceeds of the property, or a part of the property remains in the sheriff's or the receiver's hands after satisfying the judgment and the costs and expenses of the special proceeding, the judge must make an order, directing the sheriff or receiver to pay the money or deliver the property so remaining in his hands, to the judgment debtor, or to such other person as appears to be entitled thereto, upon payment of his fees and all other sums legally chargeable against the same.

The decisions bearing on these sections are mainly under the old Code, and the revisers, in reporting substantially the scheme finally adopted by their original draft, state that they are proposed as a substitute for sections 293 and 297. They add the following: "The practical utility of both these sections has been so narrowed if not destroyed by the adjudications thereunder that they should no longer be suffered to remain in the statute book; for they have become more than snares into which ignorant persons may be entrapped to their serious damage by inexperienced, careless or unscrupulous attorneys. With respect to section 293, it was held in *Robinson v. Weeks*, 6 How. 161; *Richardson v. Ainsworth*, 20 id. 521, and *Lyman v. Cartwright*, 3 E. D. Smith, 117, that any payment made thereunder is at the risk of the person who makes it, who is not protected if the judgment debtor has parted with the demand, although he acted in good faith and without notice of the transfer. This ruling appears to proceed upon the ground that the statute uses the expression 'any person indebted to the judgment debtor,' whereas it is said that if the judgment debtor parted with the demand the person making the payment was then, notwithstanding his want of notice, indebted to the transferee, and not to the judgment debtor. As a similar expression is used in section 297 it would appear that the same result would follow where money was paid pursuant to an order made under that section. Still it has been held in

the courts of original jurisdiction that an order made under that section protects the person who obeys it; and this ruling has been followed by the Court of Appeals to a qualified extent in *Gibson v. Haggerty*, 37 N. Y. 555. But the prevailing opinion in the latter case condemned, in forcible language, the character of the proceedings then under review; and, inasmuch as the more recent decisions of the same court hold that under similar circumstances the judge who made the order has no power to enforce it (and perhaps, inferentially, that he has no power to make it); its effect as a protection to the person obeying it may still be regarded as an open question. The decisions referred to arose upon the much vexed question respecting the nature of the 'property' to which section 297 applies; and, apparently, the conflict of opinion has been prolonged by a disagreement upon that point between the Court of Appeals and the Commission of Appeals, for *Lynch v. Johnson*, 48 N. Y. 27, decided by the commission in September, 1871, clearly holds that section 297 applies to a debt due to the judgment debtor; while *West Side Bank v. Pugsley*, 47 N. Y. 368, decided by the court January, 1872, holds that it is confined to 'goods or specific property.' Probably the latter case, as it reflects the opinion of the permanent court, will ultimately prevail. But under this construction section 297 is of little more utility than section 293, for the property to which the court holds it is confined, can be reached by execution. The scheme which we propose to substitute for that which has, we think, resulted in a failure may not be the best, but it is, we think, practicable, and it preserves all the features of the original scheme which it is expedient to retain, and avoids the mistakes of the latter."

It will thus be seen that the adjudicated cases cannot be relied on to interpret the language of the Code as it now stands, but that by reason of the numerous changes explained at length by the commissioners, great care must be exercised by the practitioner in relying upon adjudications before the enactment of the present sections. Many of the decisions are rendered entirely obsolete, while the rules laid down in others are embodied in the text. A brief resumé only of the authorities will be given. It was held under the then existing provisions that the payment to a third person was no protection against a *bona fide* assignee or claimant. *Richardson v. Ainsworth*, 20 How. 521; *Robinson v. Weeks*, 6 id. 561; *Adams v. Welsh*, 43 N. Y. Super. 52; *Countryman v. Boyer*, 3 How. 386; *Huse v. Guyot*, 3 T. & C. 790; *Hall v. Olney*, 65 Barb. 27; *Bishop v. Garcia*, 14 Abb. (N. S.) 69; *Duffield v. Horton*, 73 N. Y. 218.

The burden was on the party paying to show that there was a judgment. *Handly v. Greene*, 15 Barb. 601. The payment was regarded as money paid to the use of the judgment debtor, and could be set up as a counter-claim. *Calkins v. Packer*, 21 Barb. 275. The payment was said to be valid, although no notice was given to the judgment debtor. *Gibson v. Haggerty*, 37 N. Y. 555. It was held in *Lynch v. Johnson*, 48 id. 27, that payment or liability to pay in pursuance of such an order was a defense to the debtor in an action against him by his creditor, or by an assignee who is not shown to be a *bona fide* purchaser for value of the claim prior to the accruing of the judgment creditor's lien by these proceedings. The provisions applied only to money due at the time of obtaining the order. *Stewart v. Foster*, 1 Hill, 505; *Potter v. Low*, 16 How. 549; *Atkinson v. Sewine*, 11 Abb. (N. S.) 384; *Caton v. Southwell*, 13 Barb. 335; *Sands v. Roberts*, 8 Abb. 343. It does not apply to a right of action for a tort or even a verdict therefor. *Davenport v. Ludlow*, 4 How. 337; *Ten Broeck v. Sloo*, 15 id. 28. But when judgment is perfected it may be paid to the sheriff. *Mallory v. Norton*, 21 Barb. 424. An interest in a patent may be reached under this proceeding. *Barnes v. Morgan*, 3 Hun, 703; *Gillett v. Bate*, 86 N. Y. 87. As may a dower right. *Payne v. Becker*, 87 id. 153; *Moak v. Coats*, 33 Barb. 498; *Stewart v. McMartin*, 5 id. 438. Also an estate by the curtesy. *Beamish v. Hoyt*, 2 Robt. 307. A seat in the New York Stock Exchange, or in the New York Cotton Exchange, is property, and passes to a receiver, who has a right to redeem the seat when it has been pledged by the debtor as collateral. *Rittenband v. Baggett*, 4 Abb. N. C. 67; *Sewell v. Jones*, 61 How. 54; *Grocers' Bank v. Murphy*, 10 Daly, 168; *Powell v. Waldron*, 89 N. Y. 328. Property without the State is held liable under this proceeding. *Fenner v. Sanborn*, 37 Barb. 610; *Sickels v. Hanly*, 4 Abb. N. C. 231. See, however, *Ten Broeck v. Sloo*, 2 Abb. 234; *Ball v. Goodenough*, 37 How. 479. The alimony directed to be paid in divorce proceedings may be reached. *Stevenson v. Stevenson*, 34 Hun, 157. The proceeds of insurance on the life of a husband, after they have been deposited in bank by the wife, may be ordered paid over. *Crosby v. Stephan*, 32 Hun, 478; appeal dismissed, 97 N. Y. 606. It is said in *Sergeant v. Bennell*, 3 How. (N. S.), that moneys received by the widow of a policeman from the pension fund cannot be reached either before or after it reaches her hands. The earnings of a judgment debtor, not exempted by section 2463, can be reached. *Tripp v. Childs*,

14 Barb. 85; contra, *Albright v. Kempton*, 4 Civ. Pro. 16. Whatever property can be reached by a creditor's bill can, it seems, be reached by these proceedings. *Barnes v. Morgan*, 3 Hun, 703. Salary of an officer of a municipal corporation, lying in the treasury, cannot be reached. *Waldman v. O'Donnell*, 57 How. 215; *Coleman Institute v. Oregon*, 11 Civ. Pro. 108; *Remmey v. Gedney*, 57 How. 217. Pension money is exempt from seizure. *Wildrick v. De Vinney*, 18 Week. Dig. 355; *Stockwell v. National Bank*, 36 Hun, 583; *Burgett v. Fancher*, 35 id. 647. See, however, *Youmans v. Boomhower*, 3 T. & C. 21. In *Matter of Castle*, 2 N. Y. State Rep. 362, it was held that where funds were deposited by the order of the court in partition the assignee of the debtor and the receiver must try the issue as to right to the property in an action. Earnings or money acquired after service of the order cannot be reached by order. *Fischer v. Leseberg*, Abbott's Annual, 1884, p. 305. In order to ascertain whether there is a surplus arising out of trust estate an action is necessary. *Manning v. Evans*, 19 Hun, 500. Insurance moneys on household furniture cannot be reached during a reasonable time to allow the debtor to replace them. *Cooney v. Cooney*, 65 Barb. 524. After the amount necessary to satisfy the claims of the receiver have been paid the debtor is reinstated in his rights as to the property. *Lanigan v. The Mayor*, 70 N. Y. 454. The proceeding is limited to reaching property of the debtor in his possession, or in the possession of others conceded to be his. *Stewart v. Foster*, 1 Hill, 505; *Winters v. McCarthy*, 2 Abb. N. C. 357; *Peters v. Kerr*, 26 How. 3; *Hall v. McMahon*, 10 Abb. 103. Where the defendant is in possession of property which is claimed to belong to the wife the order cannot be made. *Sackett v. Newton*, 10 How. 560. The judge cannot try and determine conflicting claims. *Robeson v. Ford*, 3 Edw. 441; *Stewart v. Foster*, 1 Hill, 505; *People v. King*, 9 How. 97; *Joyce v. Holbrook*, 7 Abb. 338; *Teller v. Randall*, 26 How. 155; *Rodman v. Henry*, 17 N. Y. 482. The title must be settled in an action to be brought by the receiver. *Barnard v. Kobbe*, 54 N. Y. 516; *Teller v. Randall*, 40 Barb. 242; *Locke v. Mabbett*, 2 Keyes, 457; *West Side Bank v. Pugsly*, 47 N. Y. 368. But the person claiming the property may be restrained from paying over. *Maurice v. Smith*, 5 Week. Dig. 255. The order to apply the property may be in the alternative that defendant pay over, or an attachment issue. *Crouse v. Wheeler*, 33 How. 337. A debtor who has mortgaged chattels by a mortgage payable on demand, cannot be ordered to deliver the

property to a receiver. *Griswold v. Tompkins*, 7 Daly, 214. It was held the judge could not direct property to be paid over to the creditor; that there should be a levy and sale under execution, or a receiver. *Dickinson v. Onderdonk*, 18 Hun, 479. The order for a third person to pay over should never be made where the indebtedness or its amount is either disputed or uncertain. *Sanford v. Mosier*, 13 How. 137; *Alexander v. Richardson*, 7 Robt. 63; *People v. Hulburt*, 5 How. 446; *Grassmuck v. Richards*, 2 Abb. N. C. 359; *Hentz v. McGehee*, 1 Law Bull. 3; *Corning v. Tooker*, 5 How. 16; *Moller v. Wells*, 29 Hun, 587. As to how far the former statute protected one who paid over under the order, see *Gibson v. Haggerty*, 37 N. Y. 555; *Lee v. Delehanty*, 25 Hun, 197; *Glenville Woolen Co. v. Ripley*, 43 N. Y. 206; *Roy v. Baucus*, 43 Barb. 310; *Waldheim v. Bender*, 36 How. 181; *Matter of Livingston*, 27 Hun, 607; *Schrauth v. Dry Dock Savings Bank*, 86 N. Y. 390; *Wright v. Cabot*, 89 id. 570. It was held in *Adams v. Welsh*, 43 N. Y. Super. 52; *Baker v. Kenworthy*, 41 N. Y. 215, that a sheriff who received money on one execution was not authorized to apply it on another execution in his hands against the plaintiff in the former suit. On a motion for an order directing a third party to pay to the judgment creditor, it was held that there was no authority for such an application. *Birnbaum v. Thompson*, 5 Law Bull. 30.

§ 2451. The judge by whom the order or warrant was granted, or to whom it is returnable, may make an injunction order, restraining any person or corporation, whether a party or not a party to the special proceeding, from making or suffering any transfer or other disposition of, or interference with, the property of the judgment debtor, or the property or debts concerning which any person is required to attend and be examined, until further direction in the premises. Such an injunction order may be made simultaneously with the order or warrant by which the special proceeding is instituted, and upon the same papers; or, afterward, upon an affidavit, showing sufficient grounds therefor. The judge or the court may, as a condition of granting an application to vacate or modify the injunction order, require the applicant to give security, in such a sum and in such a manner as justice requires.

This section, as it now stands, seems to change the rule laid down in *Green v. Bullard*, 8 How. 313, to the effect that the order in this proceeding is not an injunction. The details are much fuller than those of section 299 of the old Code, for which it is a substitute. A judgment debtor who has been served with an order for appearance and examination in proceedings supplementary to execution, which forbids him from transferring any of his property until further directions, is not guilty of contempt in applying his earn-

ings for services rendered within sixty days before the commencement of the proceedings to the support of his family. The Code of Civil Procedure does not authorize any interference with such earnings, and it is not necessary for the debtor to secure permission of the court or judge before making such application. The provision of the Code that the facts constituting the exemption shall be made to appear by the oath of the debtor or otherwise, is answered by putting upon the debtor the burden of justifying the use of his earnings when called upon to transfer the money to the sheriff or receiver. *Hancock v. Sears*, 93 N. Y. 79; reversing 29 Hun, 96, and overruling *Newell v. Cutler*, 19 id. 74. Where, in proceedings supplemental to execution, an order is issued restraining a third person from disposing of property belonging to the judgment debtor "until further order in the premises," an order appointing a receiver is such further order; it is the final order in the proceedings, and any restraint thereafter desired should be inserted in that order. *People v. Randall*, 73 N. Y. 416. An injunction restraining executors from applying the proceeds of a trust to the use of the *cestui que trust* is improper. All that can be reached to be applied in satisfaction of a judgment is the surplus beyond what is necessary for the judgment debtor's support, and this can only be done by an equitable action. See *Williams v. Thorn*, 78 N. Y. 270; *Morgan v. Von Kohnstamm*, 60 How. 161; *Locke v. Mabbett*, 2 Keyes, 457; *Campbell v. Foster*, 35 N. Y. 361; *Graff v. Bonnett*, 31 id. 9. An irregularity in obtaining the injunction is not waived by a motion to dissolve it. *Wilkie v. Roch*, 5 Week. Dig. 352. As to what does not constitute a violation of an injunction, see *Buller v. Niles*, 35 How. 329; *Morris v. First National Bank*, 68 N. Y. 362; *Glenville Woolen Co. v. Ripley*, 43 id. 206. As to what does constitute a violation, see *People v. Kingsland*, 3 Keyes, 325; *The Deposit National Bank v. Wickham*, 44 How. 421. The injunction clause in an order does not apply to property received by the debtor subsequent to the service of the order. *McGivney v. Childs*, 41 Hun, 607. See, however, *Gillett v. Hilton*, 11 Civ. Pro. 108. A stay of proceedings upon a judgment merely suspends supplementary proceedings thereon, and if the debtor conveys his property, pending the stay, in violation of the injunction contained in the order for examination, he is guilty of contempt. *Woolf v. Jacobs*, 36 N. Y. Super. 408.

§ 2452. An injunction order or an order requiring a person to attend and be examined, made as prescribed in this article, must be served as follows:

1. The original order, under the hand of the judge making it, must be exhibited to the person to be served.

2. A copy thereof, and of the affidavit upon which it was made, must be delivered to him.

Service upon a corporation is sufficient if made upon an officer, to whom a copy of a summons must be delivered, where a summons is personally served upon the corporation; unless the officer is specially designated by the judge, as prescribed in section two thousand four hundred and forty-four of this act.

Where the order requiring the judgment debtor to appear and submit to an examination is not served upon him until after the return day specified therein, no jurisdiction is acquired by the subsequent appearance of said debtor for the purpose of raising objection of total want of jurisdiction, and the objection may be raised at any stage of the proceedings. *Henderson v. Stone*, 40 How. 333. But where a sheriff's certificate of service was made, although not sufficient evidence, yet an appearance was held to cure the defect. *Utica City Bank v. Buell*, 17 How. 498. And an irregularity in service is waived by appearance and submitting to an examination without objection. *Billings v. Carver*, 54 Barb. 40; *Newell v. Cutler*, 19 Hun, 74. Where the debtor, after being served, moved to vacate the order, and on such motion an order was made denying it, and ordering the debtor to appear on a day named, it was held the last-mentioned order need not be served personally. *Johnson v. Tuttle*, 17 Abb. 315.

§ 2453. The sheriff, when he arrests a judgment debtor by virtue of a warrant issued as prescribed in this article, must deliver to him a copy of the warrant and of the affidavit upon which it was granted.

§ 2454. A special proceeding, instituted as prescribed in this article, may be discontinued at any time, upon such terms as justice requires, by an order of the judge, made upon the application of the judgment creditor. Where the judgment creditor unreasonably neglects or delays to proceed, or where it appears that his judgment has been satisfied, his proceedings may be dismissed, upon like terms, by a like order, made upon the application of the judgment debtor, or of the plaintiff in a judgment creditor's action against the debtor, or of a judgment creditor who has instituted either of the special proceedings authorized by this article. Where an order appointing a receiver or extending a receivership has been made, in the course of the special proceeding, notice of the application for an order specified in this section must be given, in such a manner as the judge deems proper, to all persons interested in the receivership, as far as they can conveniently be ascertained.

This provision is new, and renders obsolete most of the cases with reference to abandonment or discontinuance. It was held in *Squire v. Young*, 1 Bosw. 690, that where the creditor designedly omits to attend on any day to which the proceedings are adjourned the proceedings may be regarded as abandoned; and in *Thomas v. Kircher*,

15 Abb. (N. S.) 342, that no order for that purpose is necessary. See, also, *Bennett v. McGuire*, 58 Barb. 625; *Schanck v. Conover*, 56 How. 437; *Gaylord v. Jones*, 7 Hun, 480. And it was said in *Carter v. Clarke*, 7 Robt. 490, and *Ammidon v. Walcott*, 15 Abb. 314, that unless the proceedings are regularly continued from day to day jurisdiction is lost. But that the error is waived by the subsequent appearance of the debtor. *Hawes v. Barr*, 7 Robt. 452. To the contrary, as to loss of jurisdiction, is *Underwood v. Sutcliffe*, 10 Hun, 453; reversed on another point, 77 N. Y. 58. In proceedings before a referee a discontinuance should not be had before report made, and should be on notice. *Kennedy v. Norcott*, 54 How. 87.

§ 2455. The judge may make an order, allowing to the judgment creditor a fixed sum, as costs, consisting of his witnesses' fees and other disbursements, and of a sum, in addition thereto, not exceeding thirty dollars; and directing the payment thereof, out of any money which has come, or may come, to the hands of the receiver, or of the sheriff; or, within a time specified in the order, by the judgment debtor, or other person against whom the special proceeding is instituted.

The judge may direct payment of the costs out of any property found applicable to the payment of the debt. *Kearney's Case*, 22 How. 309. And the judge has power to make the orders for costs, up to the making of the final order applying the funds in the hands of the receiver. *Webber v. Hobbie*, 13 How. 282. The order cannot properly be made until the termination of the proceeding. *Davis v. Turner*, 4 How. 190. In practice the order for costs is embodied in the order appointing a receiver. It does not affect the order that the costs are termed counsel fee. *Hulsaver v. Niles*, 11 How. 446. Fees paid to a stenographer and for preparation of maps are not taxable. *Provost v. Farrell*, 13 Hun, 303. If, on a reference in supplementary proceedings, the creditor is unsuccessful, and fails to establish the existence of any property on an allegation of which he obtained the order, he cannot be allowed costs. *Boelger v. Swivel*, 1 How. (N. S.) 372. Citing *Winters v. McCarthy*, 2 Abb. N. C. 357; *Peters v. Kerr*, 22 How. 3; *Hull v. McMahon*, 10 Abb. 103. The costs allowed are not motion costs, but the final costs of the special proceeding. The establishment of a method of collection impliedly prohibits their collection in any other way. No execution can be issued therefor. *Valiente v. Byran*, 3 Civ. Pro. 358. Conceding that costs in supplementary proceedings should be adjusted by the court, they are sufficiently so adjusted when first taxed by the clerk, and the court orders them readjusted. *Foley v. Rathbone*, 12 Hun, 589.

§ 2456. Where the judgment debtor, or other person against whom the special proceeding is instituted, has been examined, and property, applicable to the payment of the judgment, has not been discovered in the course of the special proceeding, the judge may make an order, allowing him a like sum as costs; and directing the payment thereof, within a time specified in the order, by the judgment creditor; or, except where it is allowed to the judgment debtor, out of any money which has come, or may come, to the hands of the receiver or of the sheriff.

Upon dismissing proceedings against a debtor upon the ground that the affidavit upon which the order was based is defective, the court may impose costs upon the creditor. The limitation of sections 2455 and 2456 relates only to costs in the proceeding. *Hulson v. Weld*, 38 Hun, 142. But this section does not provide for the award of costs to a debtor without an examination. *Simms v. Frier*, 2 Law Bull. 97. Where defendant is awarded costs because no property was found, he cannot be charged with fees of stenographer and witnesses, although allowed credit on the judgment therefor. *Boelger v. Swivel*, 1 How. (N. S.) 372. Where a receiver brought an unsuccessful action, an order compelling a person to pay costs as one beneficially interested in the recovery, cannot be made until after judgment against the plaintiff for costs has been perfected. *Fredricks v. Niver*, 28 Hun, 417. A third person was held entitled to costs where the proceedings had been long and no property discovered. *Anon.*, 11 Abb. 108. Also *Anon.*, 3 Sandf. 725. Also in *Sloane v. Higgins*, 2 Law Bull. 11. But, as a general rule, it is held that the creditor is entitled to once examine the debtor without liability for costs.

§ 2457. A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee, made pursuant to the last two sections, or to any other provision of this article, and duly served upon him, or an oral direction, given directly to him by a judge or referee, in the course of the special proceeding; or to attend before a judge or referee, according to the command of a subpoena duly served upon him, may be punished by the judge, or by the court out of which the execution was issued, as for a contempt.

This section settles a somewhat controverted question as to whether the judge or the court should exercise the power to punish for contempt. That the judge had full power was held in *Shepherd v. Dean*, 13 How. 173; *In re Smethurst*, 4 id. 369; *Lathrop v. Clapp*, 40 N. Y. 328. Also when sitting at Special Term. *Dresser v. Van Pelt*, 15 How. 19; *People, ex rel., v. Kelly*, 22 id. 309. The attachment should be made returnable before the judge before whom it was issued, and not before one of the judges at chambers, but an error in this respect makes it only voidable and is waived by giving

a bond. *Kelly v. McCormick*, 28 N. Y. 318. Such proceedings, pending before a county judge, do not abate upon the expiration of his term of office, and may be continued before his successor. *Holstein v. Rice*, 24 How. 135. In an action in the Supreme Court the power to punish for a contempt is not vested exclusively in the county judge before whom the proceedings are pending; the Supreme Court has concurrent jurisdiction. *Tremain v. Richardson*, 68 N. Y. 617. A judgment debtor may be punished for contempt in not appearing pursuant to an order; although he was not served with summons in the original action, the question cannot be raised in this proceeding. *Keller v. Zeigler*, 5 Law Bull. 15. So where a partner was not served in an action to reach the joint property of the firm. *Perkins v. Kendall*, 3 Civ. Pro. 240. So where the referee fixes the time and place of hearing, pursuant to order of the court, and the debtor fails to appear. *Redmond v. Goldsmith*, 2 Law Bull. 19. A person interfering with the possession of a receiver is liable to punishment for contempt. *People's Bank v. Moody*, 1 Law Bull. 52. Where a person appears and answers without objection, he waives all except jurisdictional defects, and may be punished if he disobeys the order of the court. *Matter of Johns*, 1 Law Bull. 76; *Lehmaier v. Griswold*, 46 N. Y. Super. 11. But a defendant sued by a wrong name will not be considered in contempt for failing to comply with an order where his name is erroneously stated, both in the judgment and order, although he is the real person intended. *Muldoon v. Pierz*, 1 Abb. N. O. 309. It is no excuse for a debtor's non-appearance that the order is irregular; he should appear and move to set it aside. *Shults v. Andrews*, 54 How. 373. But if it appears that the execution on the judgment was not returned unsatisfied, a motion to punish for contempt for not appearing was set aside. *Sloane v. Higgins*, 1 Law Bull. 59. If, on the return of the order to show cause, the party appears and submits to an examination, the court proceeds no further with the contempt. *Hilton v. Patterson*, 18 Abb. 245. A debtor failing to appear on a return day fixed simply by parol between the creditors' counsel, the debtor, and the referee, may be punished for a contempt for failure to appear. *People v. Oliver*, 66 Barb. 570. It seems, under *Miller v. Adams*, 52 N. Y. 409, that the judge may take judicial notice of the failure of the debtor to appear before him so as to base proceedings thereon. It is no excuse for non-appearance that the debtor, subsequent to the service of the order, filed a petition in bankruptcy. *Spaid v. Hoge*, 1 Week.

Dig. 24. The fact that the referee is hostile to the debtor does not excuse his non-appearance; he should apply to the judge to vacate or modify the order. *Tremain v. Richardson*, 68 N. Y. 617. Upon finding a party guilty of contempt for not appearing, the judge has no authority to impose a fine equal to the amount of the judgment, but he should impose a fine sufficient to pay costs and expenses, and order the defendant to appear for examination. *Reynolds v. Gilchrist*, 9 Hun, 203. On motion to punish for contempt for not appearing, the certificate of the referee is not legal evidence of the failure to appear; an affidavit proving the facts charged is necessary. *Rhineland v. Dunham*, 2 Civ. Pro. 32. When the judgment debtor is shown to have been a member of a firm, and his copartners refused to state the amount received by the judgment debtor from the business, and whether the books of the firm were under his control, it was held that the committal of such partner was proper. *People v. Marston*, 18 Abb. 257. When a referee, on an examination before him, directs a witness to answer, it is a sufficient order, and the question being proper, if the witness refuse to answer, he is guilty of a contempt. *Lathrop v. Clapp*, 40 N. Y. 328. To support a conviction for contempt for transferring property, the legal title to the property disposed of must have been in the accused. *Dean v. Hyatt*, 5 Week. Dig. 67. And it must have been acquired prior to the granting of the order. *Potter v. Low*, 16 How. 549. Transfer of property to his attorney is a violation of the injunction. *Deposit National Bank v. Wickham*, 44 How. 421. As is payment of rent of a place of business and residence. *Aschemorr v. Enmont*, 6 Law Bull. 81. But not to proceed to judgment in a pending suit. *Parker v. Wakeman*, 10 Paige, 485. See *People, ex rel. Morris, v. Randall*, 73 N. Y. 416. A debtor is not guilty of contempt in applying his earnings for services within sixty days of the commencement of the proceedings to the support of his family. The debtor need not procure the order of a judge before making the application. *Hancock v. Sears*, 93 N. Y. 79; reversing 29 Hun, 96, and overruling *Newell v. Cutler*, 19 id. 74. Refusal to surrender possession of property is not contempt, unless the order not only required a conveyance but also delivery of the possession. *Tinkey v. Langdon*, 60 How. 180. Nor will he be compelled to deliver possession of personal property to a receiver where it is covered by a chattel mortgage which, at the date of the receiver's appointment, is past due. *Tinkey v. Langdon*, 13 Week. Dig. 384. Where a debtor, on examination, admitted his

indebtedness, and an order was made for him to pay the judgment, and he afterward ascertained that it had been assigned, it was held he should not be punished for contempt in disobeying the order, but that the order should be vacated, and that the validity of the assignment could not be questioned except by a receiver. *Beebe v. Kenyon*, 3 Hun, 73.

Where the direction is to pay the judgment the debtor is not bound to pay the receiver. *People, ex rel., v. King*, 9 How. 97; *Watson v. Fitzsimmons*, 5 Duer, 629. The property must be shown to be under the control of the party directed to deliver it. *Tinker v. Crooks*, 22 Hun, 579; *Richie v. Bedell*, 22 Week. Dig. 563. The judgment debtor was a resident of Pennsylvania, and was required, by an order in supplementary proceedings, to deliver to the sheriff certain moneys paid to him as wages after service of the order, which money, it appears, was in Pennsylvania. *Held* error, that the court had no power to compel the debtor to go out of the State to get the money; the most it could do, *it seems*, would be to require the debtor to transfer his title to the money to the receiver. *Buchanan v. Hunt*, 98 N. Y. 560; reversing 33 Hun, 329. Where the debtor is ordered to pay the debt, and a specified sum for costs within a specified time, on his failure to do so he may be proceeded against as for a contempt, and imprisoned until the order be complied with. *Brush v. Lee*, 6 Abb. (N. S.) 50. But payment of a debt due a judgment debtor from a third person cannot be compelled by means of contempt proceedings. *West Side Bank v. Pugsley*, 47 N. Y. 368. Upon the appearance of a debtor pursuant to an order for his examination, he admitted that he had in his possession money and property sufficient to satisfy the judgment, and requested an adjournment to enable him to apply it on the judgment. The judge made an order reciting the facts, and giving him until a day named to pay the judgment, and providing in default thereof that he be adjudged guilty of a willful contempt. It further ordered that in such case he pay a fine and be imprisoned until the payment thereof, and ordered a commitment issue to carry this judgment into effect. *Held*, that the defendant could only be convicted of a contempt upon the return of an attachment or an order to show cause, and that the court could not thus simultaneously make an order and declare the consequences of a disobedience to it. *Tinker v. Cook*, 22 Hun, 579. Where the defendant failed to appear upon an order for his examination he was fined \$500, and committed without bail in default of payment. *Waters v. Miller*, 3 Law

Bull. 101. A fine to the full amount of the judgment on failure to appear is excessive; it should be only such sum as will reimburse the creditor for costs and expenses. *Reynolds v. Gilchrist*, 9 Hun, 203. A judgment debtor is not in contempt for disobeying an order directing the assignment and conveyance of land without the State. *Smith v. Tozer*, 3 State Rep. 263. The costs on reversal of an order directing a commitment for contempt in supplementary proceedings are but \$10 costs and disbursements. *Jones v. Sherman*, 8 State Rep. 344. The proceedings on contempt are fully discussed under that title under section 2266 *et seq.*, and reference is made to the cases cited and procedure there detailed for the practice in full in all cases of contempt. The forms there given can be readily adapted to contempt under these proceedings, and it is, therefore, deemed unnecessary to multiply precedents.

§ 2458. [Amended, 1881.] In order to entitle a judgment creditor to maintain either of the special proceedings, authorized by this article, the judgment must have been rendered upon the judgment debtor's appearance, or personal service of the summons upon him, for a sum not less than twenty-five dollars, and the execution must have been issued out of a court of record; and, either,

1. To the sheriff of the county where the judgment debtor has, at the time of the commencement of the special proceeding, a place for the regular transaction of business in person; or,
2. If the judgment debtor is then a resident of the State, to the sheriff of the county where he resides; or,
3. If he is not then a resident of the State, to the sheriff of the county where the judgment-roll is filed; unless the execution was issued out of a court, other than that in which the judgment was rendered, and, in that case, to the sheriff of the county where the transcript of the judgment is filed.

This section is in accordance with *Bartlett v. McNeil*, 60 N. Y. 53, to the effect that the debtor must have been personally served or appeared in the action or the proceedings cannot be had. Supplementary proceedings may be taken on a judgment for costs as the Code now stands. *Davis v. Herrig*, 65 How. 290. To authorize the examination of a non-resident of the county it must appear that defendant has a place in the city for the transaction of business in person as distinguished from transactions through his agents. *Brown v. Gump*, 59 How. 507. Where a transcript of a justice's judgment is filed in Kings county, and a transcript in New York, it was held execution was properly issued to the sheriff of the latter county, returnable to the clerk of Kings, and that supplemental proceedings could be had in the Common Pleas. *Strybing v. Hicks*, 2 Law Bull. 6. Under the old Code it was held supplemental proceedings could not be instituted where a transcript of a justice's judgment for less than \$25, exclusive of costs, has been filed, and an

execution thereon had been returned unsatisfied. *Wolf v. Jordan*, 22 Hun, 108.

§ 2459. If the judgment debtor, or other person, required to attend and be examined, as prescribed in this article, or the officer of a corporation, required to attend in his behalf, is, at the time of the service of the order upon him, a resident of the State, or then has an office within the State, for the regular transaction of business in person, he cannot be compelled to attend, pursuant to the order, or to any adjournment, at a place without the county wherein his residence or place of business is situated.

The residence is determined by the place where the debtor resided when execution against the property has issued. *Bingham v. Disbrow*, 37 Barb. 24; *McEwan v. Burgess*, 25 How. 92; *Jesup v. Jones*, 32 id. 191. It is not necessary that supplementary proceedings should be conducted in the judicial district in which the action was tried and judgment entered. They may be instituted before a justice of the Supreme Court in another district. *Jacobson v. Doty, etc., Co.*, 32 Hun, 436. A weigher in the New York Custom House has not, as such, a place of business in the city of New York. *Belknap v. Hasbrouck*, 13 Abb. 418, *n.* The place of business need not be the principal place of business of the debtor. *McEwan v. Burgess*, 25 How. 92. Where the execution was issued to Queens, where the judgment debtor resided, and returned unsatisfied, it was held that a justice of the Supreme Court in the city of New York had jurisdiction to make an order compelling a debtor to the judgment debtor, residing in the city of New York, after examination, to apply the property of the judgment debtor in his hands, or make payment to the judgment creditor upon his judgment. *Foster v. Prince*, 18 How. 258. Where execution was issued on a judgment in the New York Superior Court to a county other than New York, where the debtor resided at the time of its issue, and after its return unsatisfied the debtor removed to New York, it was held he could be examined there. *Gould v. Moore*, 51 How. 188. A judgment debtor can be examined without the county of his residence only where he has a regular place of business and transacts it in person, not merely by agent. *Brown v. Gump*, 59 How. 507. Where the debtor does not reside in the State, and has no place of residence here, the proceedings must be conducted where the judgment-roll was filed. When he has a place of business in this State he may be examined in the county where such business is carried on if a transcript has been filed there and an execution issued though the judgment-roll was filed in another county. *Anwoy v. David*, 9 Hun, 296.

§ 2460. [Amended, 1881.] A party or a witness, examined in a special proceeding, authorized by this article, is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud; or to prove that he has been a party or privy to, or knowing of, a conveyance, assignment, transfer or other disposition of property for any purpose; or that he or another person claims to be entitled, as against the judgment creditor, or a receiver appointed or to be appointed in the special proceeding, to hold property, derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor or to a person in his behalf. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding.

Previous to the amendment of 1881 this section prohibited the use of the examination of a party or witness against him as evidence of fraud in any other matter. The provisions now stand, substantially as to the use of such examination in civil actions, as did the old Code, and as to the rule then, it was held in *Bush v. Preston*, 20 Week. Dig. 190, that an answer given by a party in supplementary proceedings prior to September 1, 1880, might be used in evidence against him. In *Wright v. Nostrand*, 94 N. Y. 31, where the examination was had apparently under the old Code, it was held that the evidence of the judgment debtor, in a creditor's action taken in supplementary proceedings, was admissible not only against him as an admission, but against all the defendants for the purpose of affecting his credibility by showing conflicting statements. The evidence of a party taken on supplemental proceedings is admissible under this section of the present Code. *Dusenbury v. Dusenbury*, 63 How. 351. Proceedings under the Non-Imprisonment Act are not criminal proceedings, such as would exclude the evidence of a debtor on supplemental proceedings under the old Code. *People, ex rel., v. Spier*, 12 Hun, 67. In *Barber v. People*, 17 id. 366, it was held that the testimony of a witness in supplementary proceedings cannot be used as evidence of a fact stated by him on such examination upon a trial for a criminal offense. A judgment debtor who loses money at gambling may, on supplementary proceedings, be required to state when and where he lost his money, with the names of the winners, so that the receiver to be appointed may sue for and recover it back for the benefit of judgment creditors. The privilege of the witness in such case is removed by this section, and the protection of the law takes its place. *Steinhart v. Farrell*, 3 State Rep. 292.

§ 2461. Where the execution was issued as prescribed in section one thousand nine hundred and forty-one of this act, a debt due to, or other personal property owned by, one or more of the defendants not summoned jointly with the defend-

ants summoned, or with any of them, may be reached by a special proceeding instituted as prescribed in this article and founded upon the judgment.

§ 2462. Sections twenty-six, fifty-two and two hundred and seventy-nine of this act apply to a special proceeding instituted as prescribed in this article, and the judge before whom it is continued, as prescribed in either of those sections, it deemed to be the judge before whom an order or warrant is returnable for the purpose of any provisions of this or the next article.

§ 2463. This article does not apply where the judgment debtor is a corporation created by or under the laws of the State, or a foreign corporation specified in section eighteen hundred and twelve of this act, except in those actions or special proceedings brought by or against the people of the State. Nor does it authorize the seizure of, or other interference with, any property which is expressly exempt by law from levy and sale by virtue of an execution; or any money, thing in action, or other property held in trust for a judgment debtor where the trust has been created by, or the fund so held in trust has proceeded from, a debtor for his personal services rendered within sixty days next before the institution of the special proceeding, when it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family wholly or partly supported by his labor.

Creditors are entitled to the debtor's earnings except for the period of sixty days, computed from the time when the motion is made to apply the property. But see language of section as to time up to which creditor is entitled, as it now stands. *Bush v. White*, 12 Abb. 21; *Tripp v. Childs*, 14 Barb. 85; *Woodman v. Goode-nough*, 18 Abb. 65; *Potter v. Low*, 16 How. 549; *Cummings v. Tin-berman*, 49 id. 36. But earnings becoming due after the service of the order cannot be reached. Cases above cited and *Ireland v. Smith*, 1 Barb. 419; *Caton v. Southwell*, 13 id. 335. A debtor having a family may always have sixty days' earnings exempt. *McCullough v. Carrogan*, 24 Hun, 157. Money or property earned after the service of the order cannot be reached. A receiver becomes vested with such property as the judgment debtor had at the time of the commencement of the proceedings. *Du Bois v. Cassidy*, 75 N. Y. 298. Money or salary not yet due the debtor when the order is served cannot be reached. *First National Bank v. Beardsley*, 8 Week. Dig. 7; *Kernan v. Hill*, 1 id. 60. The proceeds of a business are not personal earnings. *Aschemorr v. Emmont*, 5 Law Bull. 80; *Whalon v. Tenison*, 1 id. 22. The judgment debtor must have a family dependent upon him to be entitled to the exemption. *Martin v. Sherman*, 2 Hill, 586; *Van Vechten v. Hall*, 14 How. 436. The teacher of a school who is entitled to payment in advance may claim his earnings as exempt. *Miller v. Hooper*, 19 Hun, 394. A judgment recovered by a debtor for damages for sale of exempt property cannot be reached until a reasonable time has elapsed to enable him to apply the proceeds to acquiring exempt

property. *Tillotson v. Wolcott*, 48 N. Y. 188. Section 1394 fixes the period of exemption at one year. This exemption should be liberally construed in favor of the debtor. *Miller v. Hooper, supra*. It is not necessary for the judgment debtor to bring the facts constituting exemption to the attention of the judge before applying his earnings to the support of his family. It is sufficient if he justifies the use when called on to transfer the money, and in such case he cannot be put in contempt. *Hancock v. Sears*, 93 N. Y. 79. The surplus rents and profits of trust property left for the support of a debtor cannot be reached in supplementary proceedings, but only in a suit for that purpose. *Manning v. Evans*, 19 Hun, 500. The court in such an action can determine what is a reasonable allowance and surplus can be reached before it accrues, and the trustees are bound by the determination. *Williams v. Thorn*, 70 N. Y. 270; S. C., 81 id. 381. It is said in *McEvoy v. Appleby*, 27 Hun, 44, that the rule laid down in the cases last cited has not been changed by section 2463.

PART II. — PROCEEDINGS SUPPLEMENTARY TO AN EXECUTION.—
THE RECEIVER.

§ 2464. At any time after making an order, requiring the judgment debtor, or any other person, to attend and be examined, or issuing a warrant, as prescribed in article first of this title, the judge to whom the order or warrant is returnable may make an order, appointing a receiver of the property of the judgment debtor. At least two days' notice of the application for the order appointing a receiver, must be given personally to the judgment debtor, unless the judge is satisfied that he cannot, with reasonable diligence, be found within the State; in which case, the order must recite that fact, and may dispense with notice, or may direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined, or the warrant, has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him.

To authorize the appointment of a receiver the proceedings must be on notice to the debtor. *Barker v. Johnson*, 4 Abb. 435; *Kemp v. Harding*, 4 How. 178; *Whitney v. Welch*, 2 Abb. N. C. 442; *Morgan v. Von Kohnstamm*, 9 Daly, 355; *Stohn v. Eppstein*, 14 Abb. N. C. 322. A receiver may be appointed of the judgment debtor's property generally, but not of a particular debt or debts, or of a specified portion of his property. *Andrews v. Glenville, etc., Co.*, 11 Abb. (N. S.) 578; *Kemp v. Harding, supra*. The application must be made to the judge who granted the order for examination. *Ball v. Goode-nough*, 37 How. 479. The notice must be served two days before return day, unless, with due diligence, the debtor cannot be found

within the State. *Morgan v. Von Kohnstamm*, 60 How. 161. A verbal notice is insufficient. *Ashley v. Turner*, 22 Hun, 226. The receiver may be appointed upon the examination where had before a judge. *Groot v. Greeley*, 5 Law Bull. 69. It is proper to make an order that the debtor appear before the judge on the Monday succeeding his examination, and a receiver may be then appointed. *Sickels v. Hanley*, 4 Abb. N. C. 231. Where there is a controversy as to title to property claimed to belong to the debtor a receiver is proper. *Dickinson v. Onderdonk*, 18 Hun, 479; *People v. Hulburt*, 5 id. 446; *Rodman v. Henry*, 17 N. Y. 482; *Ormes v. Baker*, 17 Week. Dig. 104; *Todd v. Crooke*, 4 Sandf. 694; *Bunacleugh v. Poolman*, 3 Daly, 236. It is no answer to an application for a receiver that the examination has not shown the debtor to be the owner of any property. *Myres Case*, 2 Abb. 476. Nor that the debtor is willing to allow his property to be sold under the execution, or that it could be sold. *Heroy v. Gibson*, 10 Bosw. 591; *Bailey v. Lane*, 15 Abb. 373, n. But see *Webb v. Overman*, 6 id. 92. But a receiver will not be appointed where the debtor has acquired real estate since return of execution, it not being the intent of the statute to cut off the debtor's right of redemption. *Bunn v. Daly*, 24 Hun, 526; *Tinkey v. Langdon*, 60 How. 180; *Ashley v. Turner*, 22 Hun, 226. It is held in *Dollard v. Taylor*, 33 N. Y. Super. 496, that a creditor has not an absolute right to have a receiver appointed in supplementary proceedings for the purpose of setting aside a fraudulent assignment, but the appointment is in the discretion of the court, as the creditor may proceed by bill in his own name. The courts latterly incline to treat the matter as discretionary, and more particularly in New York city. In *Matter of Edlunds*, 35 Hun, 367, it is held at General Term that there was nothing to receive, and hence no occasion for a receivership. See *De Camp v. Dempsey*, 10 Civ. Pro. 210. The language of the section disposes of the controversy as to whether a receiver could be appointed before the close of the proceeding, in accordance with the views expressed by the codifiers on reporting the draft of the revision, and settles it in accordance with the practice in *Tillotson v. Wolcott*, 48 N. Y. 188. See *De Vivier v. Smith*, 1 How. (N. S.) 48. The books of a company showed that certain shares of stock stood in the name of the judgment debtor. He denied that he owned the stock, and stated that he had previously sold and disposed of it. Held, that the judgment creditor was not concluded by this statement, but could have a receiver appointed to contest the ques-

tion. That the appointment of a receiver in no way prejudiced the company. *Hoyt v. Mann*, 7 State Rep. 420. An order for the appointment of a receiver, founded on the voluntary appearance of the judgment debtor, is valid. *Bingham v. Disbrow*, 37 Barb. 24. No one but the judgment debtor can take advantage of irregularities in the appointment of a receiver. *Underwood v. Sutcliffe*, 10 Hun, 453; reversed on another point, 77 N. Y. 58.

Precedent for Order Appointing Receiver.

SUPREME COURT.

The National Bank of Port Jervis <i>agst.</i> Jesse C. Hansee.	}
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An order having been heretofore duly made by me, pursuant to the Code of Civil Procedure, requiring the above-named defendant, Jesse C. Hansee, to make discovery on oath before Hon. William S. Kenyon, county judge of Ulster county, in relation to his property, and he having been examined accordingly: Now, on motion of W. S. Groo, attorney for Cornelia S. Hansee, I do hereby order that George R. Adams, of Rondout, Ulster county, be and he hereby is appointed receiver of the property of Jesse C. Hansee; that said receiver before entering upon the execution of his trust execute a bond with sufficient sureties, to be by me approved, to the people of the State of New York, in the penal sum of \$750, conditioned that he will faithfully discharge the duties of such trust and that said George R. Adams upon filing said bond and upon filing and recording this order in the office of Ulster county clerk, be invested with all the rights and powers as receiver according to law. That said Jesse C. Hansee execute, acknowledge and deliver to such receiver a proper and valid assignment and conveyance of all his lands and real estate, wheresoever the same are situate; that the sum of \$30 be allowed to Cornelia C. Hansee for costs of this proceeding, it appearing that she has a valid assignment of the judgment against the said Jesse C. Hansee, and is the real party in interest; and said Jesse C. Hansee is hereby enjoined and restrained from making any disposition of, or interfering with his property, equitable interests, things in action, or any of them, except in obedience to this order, until further order in the premises.

Dated January 6, 1887.

(Signature of Judge.)

Form for Receiver's Bond.

Know all men by these presents that we, Harrison Brooks, of the city of Kingston, Ulster county, by occupation a builder, and Daniel Lane, of the town of Hurley, said county, by occupation a farmer, are held and firmly bound unto the people of the State of New York in the sum of \$5,000, to be paid to the said people; for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals. Dated the 9th day of February, 1887.

WHEREAS, By an order made by Hon. William S. Kenyon, on the 1st day of February, 1887, in an action in the Supreme Court wherein George Haines was plaintiff and Frank Wood defendant, the above bounden George V. Dumont was appointed receiver of all debts, property, equitable interest and things in action of Frank Wood, a judgment debtor, pursuant to the provisions of the Code of Procedure:

Now, therefore, the condition of this obligation is such that if the said George V. Dumont shall faithfully discharge the duties of his trust as such receiver, and otherwise perform his office in all things according to the true intent and meaning of said order, then this obligation shall be void; otherwise to be in full force and effect.

(Signatures.)

(Add acknowledgment and justification clauses, with approval.)

§ 2465. The judge must ascertain, if practicable, by the oath of the judgment debtor, or otherwise, whether an action specified in article first of title fourth of chapter fifteenth of this act, or a special proceeding instituted as prescribed in article first of this title, is pending against the judgment debtor. If either is pending, and a receiver has not been appointed therein, notice of the application for the appointment of a receiver, and of all the subsequent proceedings respecting the receivership, must be given, in such a manner as the judge directs, to the judgment creditor prosecuting it.

§ 2466. Only one receiver of the property of a judgment debtor shall be appointed. Where a receiver thereof has already been appointed, the judge, instead of making the order prescribed in the last section but one, must make an order, extending the receivership to the special proceeding before him. Such an order gives to the judgment creditor the same rights, as if a receiver was then appointed upon his application; including the right to apply to the court to control, direct, or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed, to those taken under his judgment.

The fact that a receiver of a judgment debtor's property has been appointed in supplementary proceedings does not bar an application in a creditor's action, nor is it necessary to appoint the same receiver in such action. This section applies only to supplementary proceedings. *State Bank of Syracuse v. Gill*, 23 Hun, 410. Where a receiver has been appointed in proceedings instituted in favor of one judgment creditor it is in the discretion of the court, in an action brought by another judgment creditor to set aside such proceedings on the ground of collusion, to appoint another receiver, and to direct the first receiver to hand over to him the property received. *Connolly v. Koetz*, 78 N. Y. 620. Where the examination of a debtor was taken and closed, and three days thereafter an order was entered extending a receivership, without notice to the judgment debtor, *held*, that such order was unauthorized, and that the same reason for giving notice to a judgment debtor on the appointment of a receiver applies with equal force to an order extending a receivership.

Benjamin v. Myers, 3 State Rep. 284. The court has no power, without notice to the judgment debtor, to make an order directing a receiver appointed in supplementary proceedings to direct the application of any portion of the funds coming into his hands in payment of judgments, other than that under which he was appointed, or those to which his receivership has been extended under this and the two preceding sections. It is his duty to restore to the judgment debtor any surplus after the satisfaction of these judgments, and such an order, made without notice to the debtor, is not binding on him, and would be no protection to the receiver. *Goddard v. Stiles*, 90 N. Y. 199. The same case was again heard on appeal. 99 N. Y. 640. But no ruling of law was made, the decision turning on the facts.

Precedent for Order Extending Receivership.

ULSTER COUNTY COURT.

Herman Lang <i>agst.</i> Josephus J. Buckley.	}
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It appearing by the papers and proceedings herein that James Coun-tryman, of the city of Kingston, has heretofore been appointed receiver of the property of the said Josephus J. Buckley, the judgment debtor, in an action instituted as prescribed in article 1 of title 12 of chapter 17 of the Code of Civil Procedure by Herman Lang against Josephus J. Buckley, the judgment debtor; and it appearing to my satisfaction that the said receiver has, upon such appointment, given ample security for the faithful discharge of his duties as such, and that such receivership is pending undischarged, I do hereby order that the said receivership be and it hereby is extended to the special proceeding herein, pursuant to the provisions of section 2466 of the Code of Civil Procedure.

Dated *June 1*, 1887.

WILLIAM S. KENYON,
County Judge of Ulster County.

§ 2467. An order appointing a receiver, or extending a receivership, must be filed in the office of the clerk of the county wherein the judgment-roll in the action is filed; or, if the special proceeding is founded upon an execution issued out of a court, other than that in which the judgment was rendered, in the office of the clerk of the county, wherein the transcript of the judgment is filed.

Where the receiver is appointed by the Common Pleas it is held that the order appointing him must be filed in the office of the county clerk. *Genner v. Hepburn*, 6 Law Bull. 29.

§ 2468. The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him, or extending his receivership, as the case may be; subject to the following exceptions:

1. Real property is vested in the receiver, only from the time when the order, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

2. Where the judgment debtor, at the time when the order is filed, resides in another county of the State his personal property is vested in the receiver, only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides.

This section applies only to real estate situated within the State. *Smith v. Tozer*, 3 State Rep. 363.

§ 2469. Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back, by relation, for the benefit of the judgment creditor, in whose behalf the special proceeding was instituted, as follows:

1. Where an order, requiring the judgment debtor to attend and be examined, or a warrant, requiring the sheriff to arrest him and bring him before the judge, has been served, before the appointment of the receiver, or the extension of the receivership, the receiver's title extends back so as to include the personal property of the judgment debtor at the time of the service of the order or warrant.

2. Where an order or warrant has not been served, as specified in the foregoing subdivision, but an order has been made, requiring a person to attend and be examined, concerning property belonging, or a debt due, to the judgment debtor, the receiver's title extends to personal property belonging to the judgment debtor, which was in the hands, or under the control, of the person or corporation thus required to attend at the time of the service of the order; and to a debt then due to him from that person or corporation.

3. In every other case, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor at the time when the notice was served, either personally or by complying with the requirements of an order prescribing a substitute for personal service.

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted.

But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration; or the payment of a debt in good faith and without notice.

See as to security to perfect appointment, section 715. The receiver's appointment is not complete until his bond is filed. *Voorhees v. Seymour*, 26 Barb. 569; *Conger v. Sands*, 19 How. 8; *Johnson v. Martin*, 1 T. & C. 504. The last case is authority for the proposition, that, when the order required a bond with sureties from the receiver, he had no power to act until a bond with two sureties was filed, and the party against whom suit was brought was allowed to raise the question. But the omission of a seal upon a bond given by a receiver is an irregularity which can only be taken advantage of by the judgment debtor. *Morgan v. Potter*, 17 Hun, 403. As to effect of failure to file bond upon title of successor, see *Steele v. Sturges*, 5 Abb. 442. It was held in *Banks v. Potter*,

21 How. 469, that where the receiver had given ample security on his first appointment, he need not give further security on being appointed, pending his first appointment as receiver of the same estate in another action. It is said in *Wright v. Nostrand*, 94 N. Y. 31; reversing 47 N. Y. Super. 441, that the only interest a defendant has in the regularity of the appointment of a receiver, is to see that he rightfully represents the plaintiffs in order that they may not be subjected to other actions for the same cause, by persons holding a superior right. The same case discusses the provisions of section 298 of the old Code, for which this section is a substitute, and should be referred to for examination in reference to questions arising under this section, as should the decision in the court below. Where the judgment-roll is filed in the county where the debtor resides, and his real estate lies in the same county, a receiver becomes vested with the real estate upon the recording of the order appointing him. It is not necessary to record a certified copy of the order. *Fredericks v. Moir*, 28 Hun, 417; *DuBois v. Cassidy*, 75 N. Y. 298.

Where the order appointing a receiver directed the debtor to assign his real estate, but contained no directions as to delivering possession, the debtor cannot be punished for contempt for refusing to deliver such possession. *Tinkev. Langdon*, 60 How. 180. The court may, however, on motion compel the debtor to deliver his property to the receiver. *Fenner v. Sanborn*, 37 Barb. 610; *Clan Randal v. Wyckoff*, 41 N. Y. Super. 527. The time when title to the real estate vested in the receiver was fruitful of discussion prior to the amendment to section 298 of the old Code in 1862 and 1863, among the decisions being *Porter v. Williams*, 9 N. Y. 142, and *Charlataqua Bank v. Risley*, 19 id. 369; *Moak v. Coats*, 33 Barb. 498. Since that time are *Rogers v. Corning*, 44 id. 229; *Manning v. Evans*, 19 Hun, 500; *Wing v. Disse*, 15 id. 190; *Cooney v. Cooney*, 65 Barb. 524; *Hayes v. Buckley*, 53 How. 173, holding the rule as now embodied in this section, and *Scott v. Elmore*, 10 Hun, 68, contra. An *ex parte* order directing the debtor to turn over specific property to the receiver was set aside. *Reed v. Champayne*, 5 Week. Dig. 227. The receiver cannot claim property acquired subsequent to the instituting of the proceeding, or to his appointment. *Thorn v. Fellows*, 5 Week. Dig. 473; *Graff v. Bonnett*, 25 How. 470; *Merriitt v. Sawyer*, 6 T. & C. 160; *Genet v. Foster*, 18 How. 50; *DuBois v. Cassidy*, 75 N. Y. 298. He cannot maintain replevin. *Campbell v. Fish*, 8 Daly, 162. He does not take exempt prop-

erty, however broad the language of the order. *Andrews v. Rowen*, 28 How. 26; *Finnin v. Malloy*, 33 N. Y. Super. 382; *Cooney v. Cooney*, 65 Barb. 524; *Tillotson v. Wolcott*, 48 N. Y. 188; *Hancock v. Sears*, 93 id. 79. A receiver does not stand merely in the place of the debtor, but represents the creditors, at whose instance he was appointed. *Seymour v. Wilson*, 15 How. 353; *Bostwick v. Menck*, 40 N. Y. 383; *Porter v. Williams*, 9 id. 142; *Underwood v. Sutcliffe*, 77 id. 58. See *Wright v. Nostrand*, 94 id. 31. *Kennedy v. Thorp*, 51 id. 174, does not necessarily conflict with this rule. See Laws 1858, chap. 314, authorizing assignee to bring action to set aside fraudulent conveyances. The receiver is entitled to the rents and profits of the debtor's real estate. *Farnham v. Campbell*, 10 Paige, 598. To the interest of the husband as tenant by the courtesy. *Beamish v. Hoyt*, 2 Robt. 307; *Ellsworth v. Cook*, 8 Paige, 643. To a widow's right of dower. *Moak v. Coats*, 33 Barb. 498; *Thompson v. Fonda*, 4 Paige, 448; *Stewart v. McMartins*, 5 Barb. 438.

Where, in pursuance of an order appointing a receiver in proceedings supplementary to execution against a widow who was entitled to dower, but which had not been assigned to her, she conveyed her dower interest to the receiver, he having complied with the conditions of section 2468 for the vesting of the property of the judgment debtor in him, he was held entitled to maintain an action to admeasure the dower in his name as receiver. *Payne v. Becker*, 87 N. Y. 154; reversing 22 Hun, 28. But cannot, it seems, bring partition. *Payne v. Becker*, *supra*; *Du Bois v. Cassidy*, 75 N. Y. 299; *Miller v. Levy*, 46 N. Y. Super. 207. Contra, *Powelson v. Reeves*, 2 Week. Dig. 375. An annuity passes to the receiver. *De Graw v. Clason*, 11 Paige, 136; *Hallett v. Thompson*, 5 id. 583; *Ten Broeck v. Sloo*, 13 Barb. 28. As does a fund where the debtor is trustee as well as *cestui que trust*. *Craig v. Hone*, 2 Edw. Ch. 554; *McEwen v. Brewster*, 19 Hun, 337. A chattel mortgage, filed after the proceedings are instituted, does not divest the receiver of the title. *Clark v. Gilbert*, 14 Week. Dig. 241. Otherwise, as to a valid mortgage. *Campbell v. Fish*, 8 Daly, 162; *Tinkev v. Langdon*, 60 How. 180; reversed on another point, 13 Week. Dig. 384; *Gardner v. Smith*, 29 Barb. 74; *Manning v. Monaghan*, 23 N. Y. 539. Real estate, although out of the State, vests in the receiver. *Chautauqua Bank v. Risley*, 19 N. Y. 374. The receiver cannot have the possession of property alleged to belong to the debtor but in the hands of a third person, who substantially disputes the title.

Dewey v. Finn, 18 Week. Dig. 558. Where a mortgagee sells, under a chattel mortgage, more property than is sufficient to pay the mortgage debt, bids the same in himself, and takes possession, claiming the property under this title, the mortgagor may elect to treat the entire sale as valid, or to regard the amount for which the property sold in excess of the indebtedness secured as unpaid purchase-money in the hands of the mortgagee, and a receiver of the mortgagor, appointed in supplementary proceedings, may maintain an action against the mortgagee to recover such surplus. *Davenport v. McChesney*, 86 N. Y. 242. The debtor will not be directed to deliver to a receiver possession of real property upon which the judgment was a lien; the remedy is by sale under execution. *Albany National Bank v. Gaynor*, 67 How. 421. The appointment of assignees in bankruptcy of individual partners confers no power on the assignees therein to take firm property, and hence has no legal effect upon the ownership of a firm judgment, or the right of a receiver appointed in proceedings supplementary to execution thereon to maintain an action to reach the debtor's property. The fact that the bank in whose favor the judgment was rendered had ceased to be a corporation by reason of its bankruptcy subsequent to the recovery of the judgment does not invalidate plaintiff's title as receiver. Although in an action by a receiver to set aside transfers of real property he must show proceedings such as would vest title thereto in him, it is not necessary where only personal property is concerned. *Wright v. Nostrand*, 94 N. Y. 31. A receiver cannot be compelled in another action, to which neither he or the creditor was a party, to pay over money received by him as property of the debtor, nor should he be directed to pay over moneys without deducting for his commissions and expenses. *Gelston v. Syracuse Savings Bank*, 29 Hun, 594. Payment of a judgment by a debtor does not, *ipso facto*, discharge the receiver. He may have a claim for expenses incurred to be paid out of the fund. *Crooks v. Findley*, 3 Law Bull. 26. It is said in *Palen v. Bushnell*, 18 Abb. 301, that a receiver may recover usurious premiums paid by the debtor. Reversed on another point, 46 Barb. 24. The receiver can only recover so much of the property of the debtor fraudulently transferred as will satisfy the creditors at whose instance he is appointed. The transfer is good as against the debtor, and all creditors who take no steps to set it aside. *Bostwick v. Menck*, 40 N. Y. 383. The interest of a *cestui que trust* cannot be reached by the receiver except by action. *Scott v. Nevius*, 6 Duer. See §§ 1879 to 2463.

Where a trust is created in favor of the creditors of one praying the consideration of lands which are conveyed to another, the receiver is not the representative of the creditor in respect to it. See *Wood v. Robinson*, 22 N. Y. 564; *McCartney v. Bostwick*, 32 id. 53; *Underwood v. Sutcliffe*, 77 id. 58. The receiver may be substituted as plaintiff in a pending suit brought by the debtor. *Matter of Waldo*, 6 Abb. N. C. 307. But it is a matter of discretion and not of right. *In re Application of Lansing*, 17 Week. Dig. 288.

A seat in the New York Cotton Exchange is property which passes to the receiver, and defendants, in an action brought therefor by a receiver, are not aided by defects in the appointment of the receiver; the judgment debtor consented and thereby waived all irregularities. The appointment cannot be questioned collaterally for irregularity, and the plaintiff may redeem such a seat. *Powell v. Waldron*, 89 N. Y. 328. As to the intent of section 2469, see *Pustet v. Flannelly*, 60 How. 67. The receiver may be required to give security for costs where bad faith in commencing the action is shown. *Kimberly v. Goodrich*, 22 How. 424; *Jenkins v. Stow*, 2 Law Bull. 37; *Smith v. Clarke*, 1 id. 83; *Welch v. Bogert*, 3 Week. Dig. 402; *Bolles v. Duff*, 17 Abb. 48; *Briggs v. Vandenburg*, 22 N. Y. 467. He may be required to give security after obtaining leave to sue, and an order requiring security is not appealable. *Bolles v. Duff*, 17 Abb. 448; see § 3271. The court rules prescribe the procedure by a receiver on bringing suit.

RULE 79. Whenever a receiver, appointed under proceedings supplementary to execution, shall apply for leave to bring an action, he shall present and file with his application the written request of the creditor in whose behalf he was appointed, that such action be brought. Or else he shall give a bond with sufficient sureties, and that properly acknowledged and approved by the court, to the person against whom the action is to be brought, conditioned for the payment of any costs which may be recovered against such receiver. And leave to bring actions shall not be granted except on such written request, or on the giving of such security. In all other cases, where a receiver applies to the court for leave to bring an action, he shall show in such application that he has sufficient property in his actual possession to secure the person against whom the action is to be brought, for any costs which he may recover against such receiver. Otherwise the court may require the receiver to give such bond, conditioned for the payment of costs, and with such security as is above mentioned.

Whether the receiver of an insolvent corporation shall be compelled to give security for costs is within the discretion of the court at Special Term, and the order is not appealable to the General Term or the Court of Appeals. *Briggs v. Vandenburg*, 22 N. Y. 467.

§ 2470. Each county clerk must keep in his office a book, indexed to the names of the judgment debtors, styled "book of orders appointing receivers of judgment

debtors." A county clerk, in whose office an order or a certified copy of an order is filed, as prescribed in section two thousand four hundred and sixty-seven or section two thousand four hundred and sixty-eight of this act, must immediately note thereupon on time of filing it, and, as soon as practicable, must record it, in the book so kept by him. He must also, upon request, furnish forthwith to any party or person interested, one or more certified copies thereof. For each omission to comply with any provision of this section, a county clerk forfeits, to the party aggrieved, two hundred and fifty dollars, in addition to all damages sustained by reason of the omission.

§ 2471. A receiver, appointed as prescribed in this article, is subject to the direction and control of the court out of which the execution was issued. Where an order has been made, extending a receivership to a special proceeding founded upon a subsequent judgment, the control over, and direction of the receiver, with respect to that judgment, remain in the court to whose control and direction he was originally subject.

A motion to set aside an order appointing a receiver is properly made to the court and not to a judge. *Lippincott v. Westray*, 6 Civ. Pro. 74. As to power of judge to accept resignation of receiver, see *Wing v. Disse*, 15 Hun. 190, and § 715, which provides for such a contingency. The rule under the old Code was that where the receivership had been extended the receiver would be subject to the control of the court upon whose execution he was first appointed. *Binks v. Potter*, 21 How. 469. After appointment authority of a judge over receiver ceases, and he can only be compelled to account by the court. *Pool v. Safford*, 14 Hun. 369; *Tillotson v. Wolcott*, 48 N. Y. 188; *Lane v. Lutz*, 1 Keyes, 203. Contra, *Webster v. Hobbie*, 13 How. 382.

Where it does not appear in what court the judgment was taken in the suit in which the receiver was appointed, or out of what court the execution thereon was issued, there is no jurisdiction shown in the court of the fund or the receiver. *Gelston v. Syracuse Savings Bank*, 29 Hun. 594. The court will control the action of the receiver as to the disposition of the property which comes into his hands. *Wardell v. Leavenworth*, 3 Edw. 244. But it will not enjoin the receiver from taking possession of the debtor's property in a separate action. *Van Rensselaer v. Emery*, 9 How. 135. Nor to pay over trust funds to the creditors. *Genet v. Fowler*, 18 How. 50. Or to distribute funds for which he may be held liable. *Morris v. Hiler*, 57 How. 322. The court will only entertain an application for the removal of a receiver on notice. *Bruns v. Stewart, etc., Co.*, 31 Hun. 195; *Rogers v. Corning*, 44 Barb. 229. The employment of the debtor as his agent to make collections is not ground for removal. *Ross v. Bridge*, 24 How. 163. An order removing a receiver on the ground of collusion with the judgment

debtor is not appealable to the Court of Appeals. *Connolly v. Kretz*, 68 N. Y. 620. It was held in *Branch v. Harrington*, 49 How. 196; *Cummings v. Egerton*, 9 Bosw. 484, that the receiver should not employ the attorney of the judgment creditor. These decisions are overruled by *Baker v. Van Epps*, 60 How. 79. The receiver is bound to restore the surplus after payment of judgments he represents to the debtor. *Manning v. Monaghan*, 23 N. Y. 585; *Becker v. Torrance*, 31 id. 63; *Lanigan v. Mayor*, 70 id. 454; *Goddard v. Stiles*, 90 id. 199. He cannot be sued without permission of the court. *Noe v. Gibson*, 7 Paige, 513; *Parker v. Bruning*, 8 id. 388; *Taylor v. Baldwin*, 14 Abb. 166; *Riggs v. Whitney*, 15 Abb. 388; *De Groot v. Joy*, 30 Barb. 483. The rights, powers and duties of a receiver are nearly analogous to those of a receiver appointed by the Court of Chancery on a creditor's bill. *Petition of Inglehart*, 1 Sheldon, 514. If a conveyance is necessary to enable a receiver to acquire title or possession to property, the court which has jurisdiction of the judgment debtor may compel him to make such conveyance. It has this inherent power. *Chautauqua Bank v. Riseley*, 19 N. Y. 374. As a very thorough discussion of the practice in supplementary proceedings, attention is called to the case, 94 N. Y. 31, frequently cited, which settles very many questions as to the regularity of the proceedings, and the rights of the receiver, and determines that the proceeding is not one in which jurisdiction must be proved whenever questioned in a collateral proceeding, but is a remedy in a court of general jurisdiction, where the acts of the officers named are entitled to all the presumptions of regularity which belong to proceedings in courts of general jurisdiction. The attention of the practitioner is called to the fact that, under this title, as well as many others, very many cases decided before the enactment of the Code are overruled or rendered obsolete by the changed language of the present Code. No attempt has been made to determine in each instance what changes are effected by the language used in the revision. Where it is apparent, no explanation is needed. Where it is doubtful, it remains for the courts to determine the extent and character of the change, and in each particular case the practitioner will be obliged to determine whether a case cited applies to the changed conditions of the particular statute affected by it.

CHAPTER XXV.

REFERENCE OF CLAIMS AGAINST ESTATES.

The proceeding by reference to determine and enforce a disputed claim against an estate, under the provisions of the Revised Statutes relating to decedents' estates, is held to be a special proceeding and not an action. *Denise v. Denise*, 41 Hun, 9; *Roe v. Boyle*, 81 N. Y. 305; *Mowry v. Peet*, 88 id. 453; *Hatch v. Stewart*, 5 State Rep. 180; *Hopkins v. Lott*, 6 id. 12; *Russell v. Lane*, 1 Barb. 519; *Young v. Cuddy*, 23 Hun, 249; *Paddock v. Kirkham*, 102 N. Y. 597. The provisions of the Revised Statutes regulating such claims and references thereon are a portion of 2 Revised Statutes, chapter 6, title 3, article 2, as follows:

§ 34. Any executor or administrator, at any time, at least six months after the granting of the letters testamentary or of administration, may insert notice once in each week for six months, in a newspaper printed in the county, and in so many other newspapers as the surrogate may deem most likely to give notice to the creditors of the deceased, requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof, to such executor or administrator, at the place of his residence or transaction of business, to be specified in such notice, at or before the day therein named, which shall be at least six months from the day of the first publication of such notice.

§ 35. Upon any claim being presented against the estate of any deceased person the executor or administrator may require satisfactory vouchers in support thereof, and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of such claimant; which oath may be taken before any justice of the peace or other officer authorized to administer oaths.

§ 36. If the executor or administrator doubt the justice of any claim so presented he may enter into an agreement in writing with the claimant, to refer the matter in controversy to three disinterested persons, or to a disinterested person to be approved by the surrogate; and upon filing such agreement and approval of the surrogate, in the office of the clerk of the Supreme Court in the county in which the parties, or either of them, reside, a rule shall be entered by such clerk, either in vacation or term, referring the matter in controversy to the person or persons so selected.

§ 37. The referees shall thereupon proceed to hear and determine the matter, and make their report thereon to the court in which the rule for their appointment shall have been entered. The same proceedings shall be had in all respects; the referees shall have the same powers, be entitled to the same compensation, and subject to the same control, as if the reference had been made in an action in which such court might by law direct a reference, and the court may set aside the report of the referees or appoint others in their places, and may confirm such report and adjudge costs, as in actions against executors; and the judgment of the court thereupon shall be valid and effectual in all respects, as if the same had been rendered in a suit commenced by the ordinary process.

§ 39. In case any suit shall be brought upon a claim which shall not have been presented to the executor or administrator of a deceased person, within six months from the first publication of such notice, as hereinbefore presented, such administrator or executor shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any claims of an inferior degree, or of any legacies, or in making distribution to the next of kin before such suit was commenced.

The following section of the Code forms part of the system :

§ 1622. [*Amended, 1882.*] Where an executor or administrator disputes or rejects a claim against the estate of the decedent, exhibited to him either before or after the commencement of the publication of a notice requiring the presentation of claims, as prescribed by law, unless the claim is referred, as prescribed by law, the claimant must commence an action, for the recovery thereof, against the executor or administrator, within six months after the dispute or rejection, or, if no part of the debt is then due, within six months after a part thereof becomes due ; in default whereof, he, and all persons claiming under him, are forever barred from maintaining such an action thereupon, and from every other remedy to enforce payment thereof out of the decedent's property.

The amendment made to section eighteen hundred and twenty-two shall not apply when letters have been issued to one or more executors or administrators before this act takes effect ; nor shall any amendment, made by this act, invalidate or impair the effect of any proceedings heretofore taken.

Notice to creditors and its effect.— There is no absolute legal obligation on the part of executors and administrators to advertise for claims against the estate ; the notice is for their protection only. *Bullock v. Bogardus*, 1 Denio, 286 ; *Field v. Field*, 77 N. Y. 294. The giving of six months' notice to creditors, as required by law, exempts them from all liability to creditors whose claims are not presented, for any assets paid over in good faith by them in satisfaction of claims of an inferior degree, or of legacies, or in making distribution to the next of kin, *Erwin v. Loper*, 43 N. Y. 521. A publication in a newspaper in the county, pursuant to the order of the surrogate, is sufficient, unless he directs a publication in some other paper also. *Dolbeer v. Casey*, 19 Barb. 149. The executors may select a place for the presentation of claims, and their designation of it in the notice makes it their residence for the purpose of the statute. *Hoyt v. Bonnett*, 58 Barb. 529 ; reversed on another point, 50 N. Y. 538. Contra, *Murray v. Smith*, 9 Bosw. 689.

A notice to creditors "requesting" them, instead of "requiring" them, to present their claims, is sufficient. *Prentice v. Whitney*, 8 Hun, 300. But it is said executors cannot, in their representative capacity, appoint another person their attorney to dispute or reject claims against the estate, and an order that they publish a notice to present claims to their attorney, instead of themselves, is not valid. *Hardy v. Ames*, 47 Barb. 13 ; *Whitmore v. Foose*, 1 Den. 159.

An omission of a middle letter in the name of the testator in the notice to creditors is immaterial, and this is so, although there is a person living of the same name as that published, as the law recognizes but one christian name, as it did not mislead. *Carnes v. Wilkin*, 79 N. Y. 129. The same case holds that the provisions as to publication of notice and limiting the time for commencing suit upon claims disputed or rejected include claims which are contingent as well as those where the liability is certain and fixed. Knowledge of a claim by an executor does not avoid the necessity of its due presentation, or, if it be rejected, its presentation or reference within the time limited by statute. *Livingston v. Gardner*, 4 Redf. 516, n. It seems that the only effect of the publication of a notice to creditors is (1) that if a creditor chooses to present his claim, and it is rejected, he must, unless it is referred, commence an action thereon within six months, or absolutely forfeit his right of recovery; (2) if he does not choose to present his claim at all, he may, nevertheless, seek his remedy by action at any time before it is barred by the statute of limitations, though in that event he can have no costs, and can ordinarily recover from the executor or administrator only such sum as he has in his hands applicable to the claim at the time of the commencement of the action. *Cotter v. Quinlan*, 2 Dem. 29; *Greene v. Day*, 1 id. 45; *Baggott v. Boulger*, 2 Duer, 160. See *Conly v. Smith*, 4 Law Bull. 17. The party using the statute as a defense must show strict compliance with it. When defendant failed to establish due publication of notice, it was held to be no defense. *Broderick v. Smith*, 3 Lans. 26. When an answer in an action against an executor alleged that the claim had been presented and rejected, and no action brought thereon within six months after such rejection, *held*, that the short statute of limitations was sufficiently pleaded, and that the surrogate's order directing notice of publication to creditors to present claims and proof of due publication was competent. *Williams v. McIntyre*, 16 Week. Dig. 351.

The fact that the first publication was anterior to the establishment of plaintiffs' liability for contribution on a judgment paid by the decedent is immaterial. If the action is not brought within the statutory time it is barred. *Carnes v. Wilkin*, 79 N. Y. 129. Although a claim against the estate of a deceased partner upon a debt of the firm may be properly presented for allowance before proceedings had at law against the surviving partner, yet the right of action thereon does not accrue, nor the statute begin to run, until such proceedings are had, or the survivors become insolvent; claims

not yet due may be presented, also contingent liabilities. *Hoyt v. Bonnett*, 50 N. Y. 538; *Selover v. Coe*, 63 id. 438; *Francisco v. Fitch*, 25 Barb. 130; *White v. Story*, 43 id. 124; *Whitlock's Estate*, 1 Tuck. 491.

Presentation and rejection of claims.—A claim may be presented by letter, or in any way which deals fairly with the executors, and the interests they represent; the creditor is not bound to exhibit the evidence of his claim, or make oath to it, unless required to do so by the executors. *Gansevoort v. Nelson*, 6 Hill, 389. But where a claim is presented against the estate of a decedent, the executor is entitled to vouchers and the affidavit to the claim before he can be called upon to pay, and he may also require that the claim be made definite and precise. *Townsend v. N. Y. Life Ins. Co.*, Court of Appeals, 4 Civ. Pro. 398; *Weller v. Weller*, 4 Hun, 196. A debt actually presented and acknowledged by the executor or administrator before publication of notice to creditors to exhibit their claims need not be presented again for allowance, and the executor paying the interest from time to time, or a part of the principal, is tantamount to a formal admission of its justice upon presentment under notice. *Johnson v. Corbett*, 11 Paige, 265; *Field v. Field*, 77 N. Y. 294. Where executors or administrators are substituted for a deceased defendant, in a pending action, they are not entitled to presentation of the demand. *Tindall v. Jones*, 19 How. 469. When a duly verified claim is presented to an executor, he must either admit or reject it within a reasonable time, otherwise he will be presumed to have admitted it. *Magee v. Vedder*, 6 Barb. 352; *Underwood v. Newburger*, 4 Redf. 499.

If upon the presentation of a claim an executor does not admit or reject it, or offer to refer it, it is a disputed claim, which the surrogate has no jurisdiction to try. *Cooper v. Felter*, 6 Lans. 485. It will be seen these two cases are in conflict. But the rule is laid down in *Hoyt v. Bonnett*, 50 N. Y. 538, that to entitle an executor or administrator to the benefit of the short statute of limitations its requirements must be strictly complied with. His act in accepting or rejecting a claim must be decided, unequivocal, and absolute, whatever may be the language or declaration. If in the same notice or declaration he does or says any thing from which the claimant may reasonably infer that the determination to dispute or reject is not final, the claim is not disputed or rejected within the meaning of the statute. In *Lambert v. Craft*, 98 N. Y. 342, the question is settled, and the rule held that where a claim against an estate is pre-

sented in proper form, and duly verified, to the person, and at the place named in the statutory notice to creditors, and after a reasonable opportunity to examine into its validity and fairness, the executors do not offer to refer on the ground that they doubt its justice, or do not dispute it, it acquires the character of a liquidated and undisputed claim against the estate. By the amendment of 1882 to section 1822 it was made to apply to claims presented before advertisement as well as after, and an effective presentation and rejection can now be had before publication, but the amendment does not apply to cases where letters were issued before the passage of the act. *In re Hazton*, 1 State Rep. 164. The executor had admitted a claim upon a certain note. *Held*, that in so doing he acted for and represented all the persons interested in the estate; that upon this admission alone, in the absence of countervailing evidence, fraud or collusion, the surrogate was authorized to order the executor to pay it. *Matter of Kellogg*, 5 State Rep. 668.

Precedent for Petition to Advertise for Claims.

ULSTER SURROGATE'S COURT.

In the Matter of the Estate of Catharine J. De Puy, deceased. }

To the Surrogate of Ulster County:

The petition of Lucas E. Schoonmaker, sole executor of the estate of Catharine J. De Puy, late of said county of Ulster, deceased, respectfully represents, that at least six months have elapsed since letters testamentary upon the estate of said deceased were granted by the surrogate of said county of Ulster to him; that your petitioner desires that notice should be duly given to all persons having claims against the estate of the said deceased, to exhibit the same with the vouchers thereof, to the executor, at a place to be specified in such notice, within such time as is prescribed and provided by the requirements of the Revised Statutes of this State; that the said deceased, at the time of her death, and for many years previous thereto, was an inhabitant and resident of said county of Ulster; that the creditors of said deceased, as far as your petitioner has been able to discover or ascertain, reside in the county of Ulster. And your petitioner has no reason to believe that there are any creditors of said deceased residing without the said county of Ulster. Your petitioner, therefore, prays that an order may be duly made for the publication of said notice in such newspaper as the said surrogate may deem most likely to give notice to the creditors of said deceased, requiring them to exhibit their respective demands, with the vouchers thereof, to the said executor, at the office of V. B. Van Wageningen, in the city of Kingston, Ulster county, on or before the 5th day of January, 1886, or that in default thereof their claims will be debarred and precluded from payment by said executor out of

said estate, to the intent that the said executor in administering said estate may have the benefit of the protection given by the provisions of the Revised Statutes in such case provided. And your petitioner will ever pray, etc.

LUCAS E. SCHOONMAKER,

Dated *this 20th day of June, 1885.*

Executor.

Notice to Creditors.

In pursuance of an order of Hon. Oliver P. Carpenter, surrogate of Ulster county, notice is hereby given, according to law, to all persons having claims against Catharine J. DePuy, late of the town of Rochester, county of Ulster, deceased, to present the same, with the vouchers in support thereof, to the undersigned, Lucas E. Schoonmaker, the executor of the estate of said deceased, at the office of V. B. Van Wagonen, at the city of Kingston, in the said county of Ulster, on or before the 5th day of January, 1886.

Dated *June 20, 1885.*

LUCAS E. SCHOONMAKER,

Executor of, etc., of Catharine J. DePuy, deceased.

Affidavit to Claim.

ULSTER COUNTY, ss.:

Margaret R. Elting, of the town of Rochester, being duly sworn, deposes and says that the annexed claim against the estate of Catharine J. DePuy, late of the town of Rochester, said county, is justly due and owing deponent, and that no payments have been made thereon, and that there are no offsets thereto, and that the same is not secured by judgment or mortgage upon, or expressly charged on the real estate of said deceased, or any part thereof.

MARGARET R. ELTING.

Sworn to before me, this 20th }
day of October, 1886. }

JOHN D. WINFIELD, *Notary Public.*

Precedent for Rejection of Account and Offer to Refer.

To MARGARET R. ELTING:

Please take notice that I doubt the justice of the claim presented by you against the estate of Catharine J. DePuy, deceased, for \$2,850, and decline to allow the same, and that I am willing to enter into an agreement in writing to refer the matter in controversy to a disinterested person, to be approved by the surrogate of Ulster county.

Yours, etc.,

L. E. SCHOONMAKER,

Executor of, etc., of Catharine J. DePuy, deceased.

Notice of rejection must be given to the owner personally, and it is said notice to his attorney is insufficient. *Van Laun v. Farley*, 4 Daly, 165. But the notice may be signed in the names of the personal representatives by an attorney authorized by them. *Selover v. Coe*, 63 N. Y. 438. The executor cannot allow claims barred by the statute of limitations, or make a new promise to pay the

debt which is valid or binding on the estate. *Royers v. Rogers*, 2 Wend. 503; *Bloodgood v. Bruen*, 8 N. Y. 362. And if he pays a demand which is not a legal charge against the estate, and could not have been recovered, the claim may properly be disallowed on his accounting.

The offer to refer.—It is held that it is the duty of the party making the claim, and not of the executor, to make the offer to refer, and the executor cannot be said to refuse to refer until such offer by the claimant. *Buckhout v. Hunt*, 16 How. 407; *Proude v. Whiton*, 15 id. 304; contra, *Fort v. Gooding*, 9 Barb. 388. See, also, *Gorham v. Ripley*, 16 How. 313. The offer to refer need not be in writing; it may be by parol. *Lanning v. Swarts*, 9 How. 434. Respondent made this offer to decedent's executors: "I hereby offer to refer my claim against the estate you represent as provided by law; will you consent to such reference?" The executors' counsel replied: "I am instructed by the executors of the deceased to inform you that they hereby consent to refer the claim." The order of reference was presented to the surrogate, who named a referee. On service of a copy of the order, after filing, on the executors' counsel, they moved to set it aside before the surrogate on the ground that the application for the order was *ex parte*, and that no effort had been made to agree on a referee. *Held*, that the order must be set aside as improvidently granted: (1) Because the statute confers upon the surrogate no power to make any order in the premises; (2) the parties having neither agreed to abide by the nomination of the surrogate, nor united in presenting to him any name or names for his approval, his designation was invalid. *Tilney v. Clendenning*, 1 Dem. 212.

Precedent for Offer to Refer by Claimant.

TO LUCAS E. SCHOONMAKER,

Executor, etc., of Catharine J. DePuy, deceased:

Please take notice that I am willing, and hereby offer, to refer the claim made by me for \$2,850 against the estate of Catharine J. DePuy, deceased, the justice of which is doubted by you, to a disinterested person, to be approved by the surrogate of Ulster county.

Yours, etc.,

MARGARET R. ELTING.

What is referable.—The reference is not confined to claims arising on contract or at common law. All claims against the estate, whether legal or equitable, may be referred, where the executor is competent to adjust or settle them, and claims for tort are within

the statute. *White v. Story*, 43 Barb. 124; *Brockett v. Bush*, 18 Abb. 337. But a claim made by executor on his own behalf cannot be so referred, although all the parties consent thereto. *Shakespeare v. Markham*, 10 Hun, 311; affirmed, 72 N. Y. 400. But where a claim of an executor against an estate is rejected by a co-executor and referred by consent, the defendant cannot, after report and judgment in favor of such claim, object that it was not referable under the statute. *Weller v. Weller*, 4 Hun, 195. The surrogate of New York, under the provisions of chapter 359, Laws of 1870, has power to order a reference to hear and report the evidence, with the determination thereon of the claim against the estate, on the petition of an executor to prove his own claim as a creditor. *Kearney v. McKeon*, 85 N. Y. 136. Only those claims against the estate of a deceased person are referable which accrued during his life, or would have accrued against him if he had lived. Where a testator in his will gave to his widow as much as she would need for support, *held*, that an account against the estate for support furnished by a third person was not referable under the statute. *Goddling v. Porter*, 17 Abb. 374. The liability of the estate of a deceased executor for assets held by him as such executor at the time of his death is not within the statute. It contemplates an ordinary debt for which the deceased was liable in his life-time, upon a promise express or implied, a debt which may be supported by the oath of the creditor, which is justly due and may be the subject of an offset. *Sands v. Craft*, 18 How. 438. It is broad enough to include unliquidated claims by a surviving partner against the estate of a deceased partner, growing out of the partnership, including payments made after the partner's death. A claim by the personal representatives of a deceased executor against the estate of his testator is not referable under the statute, since such claim was not against the decedent for a debt due from him and not within the intent of the statute. *Stewart v. O'Donnell*, 2 Dem. 17; *Francisco v. Fitch*, 25 Barb. 130. The reference is not applicable to claims by the executor against other parties in favor of the estate, except strictly in the way of set-off. *Akely v. Akely*, 17 How. 21.

Precedent for Form of Agreement to Refer.

WHEREAS, Margaret R. Elting has lately presented a claim to Lucas E. Schoonmaker, the executor of the estate of Catharine J. De Puy, late of the town of Rochester, Ulster county, deceased, for \$2,850, a copy whereof is attached hereto, the justice of which claim is doubted by the said executor, it is hereby agreed that the matter in

controversy be referred to Howard Chipp, Jr., Esq., counselor at law, of the city of Kingston, Ulster county, N. Y., a referee, to hear and determine the same.

Dated *November 15, 1886.*

MARGARET R. ELTING,
LUCAS E. SCHOONMAKER,
Executor.

I hereby approve of the referee named in the foregoing agreement.
Dated *November 23, 1886.*

O. P. CARPENTER,
Surrogate.

Precedent for Order of Reference.

SUPREME COURT — ULSTER COUNTY.

<p>Margaret R. Elting <i>agst.</i> Lucas E. Schoonmaker, as Executor of the last will and testament of Catha- rine J. De Puy, deceased.</p>

On reading and filing the above agreement to refer the claim of Margaret R. Elting, above named, against the estate of Catharine J. De Puy, deceased, to Howard Chipp, Jr., Esq., counselor at law, of the city of Kingston, Ulster county, N. Y., as sole referee to hear and determine the same, and the approval of the surrogate of Ulster county: Now, on motion of D. M. Dewitt, Esq., of counsel for the said plaintiff,

Ordered, that the said Howard Chipp be and he is appointed referee to hear and determine the matter in controversy mentioned in said agreement.

Dated *November 23, 1887.*

J. D. WURTS, *Clerk.*

The order to refer.—The agreement to refer must present substantially the issue between the parties. *Woodin v. Bagley*, 13 Wend. 453. The surrogate made an order reciting that a claim had been presented to the administratrix and rejected; that the parties had agreed to a reference and appointed referees, to which order was added a consent that it be entered, signed by the parties' attorneys. *Held* a sufficient agreement in writing to refer. *Bucklin v. Chapin*, 1 Lans. 443. The agreement must be filed and the order actually entered, otherwise the Supreme Court does not become possessed of the cause. The requirements of the statute must be strictly complied with. *Comstock v. Olmstead*, 6 How. 77. See *Roberts v. Dittmas*, 7 Wend. 522. Every provision of the statute providing for the reference of claims against a deceased person must be strictly complied with, and every step prescribed therein must be taken in order to make a judgment entered on the report of a referee valid. *Burnett v. Gould*, 27 Hun, 366. The order is not vitiated by being entitled in Surrogate's Court, and may be entered *nunc pro tunc* to

sustain the judgment on the referee's report. The naming of the referees in the order is sufficient evidence they were approved by the surrogate. A substantial compliance with the statute is sufficient. *Bucklin v. Chaplin*, 53 Barb. 448; S. C., 1 Lans. 443.

Pleadings and proof. — Pleadings are not required on a reference under the statute, but if a claim or counter-claim, set up by the executor or administrator, is uncertain, a bill of particulars or statement of account may be required. It was said that counter-claims or offsets of a legal, as well as of an equitable nature, may be interposed before the referee, and if established to an amount exceeding the claimant's demand, judgment may be awarded by the referee against the claimant in favor of the estate, for whatever may be shown to be due. *Mowry v. Peet*, 13 Week. Dig. 16. This case is reversed, 88 N. Y. 453, and the rule held to be that neither the referee or court could render an affirmative judgment on a counter-claim. It is only available to the extent necessary to extinguish the demand of the claimant. The question as to whether the claim can be divided, and a part of it used for that purpose, is undecided, as is the effect of the judgment if the counter-claim is withheld. An action is proper in such a case. The account presented is in effect the plaintiff's complaint, and there being no pleadings, and no provision in the statute for pleadings, the defendant is limited to no particular defense, and, consequently, any and every legal defense against the claim must necessarily be available. The plaintiff must prove his claim and satisfy the referee of its justice and validity. Every species of legal proof adapted to show the injustice of the claim or its invalidity as a whole, or in a degree or amount, is admissible, and, within this rule, a set-off may be proved. The executors in turn may make any legal defense which the testator might make if he were alive and the same were properly pleaded in an action on the claim, including the statute of limitations. *Tracy v. Suydam*, 30 Barb. 110; *Converse v. Miner*, 21 Hun, 367. But by the stipulation to refer the executor is estopped from denying that his testator left a will, and that letters testamentary were issued to him. *Banfield v. Rumsey*, 4 T. & C. 322. On a reference to determine the validity of a disputed claim against an estate the heirs at law, next of kin and legatees are entitled to insist upon the statute of limitations as a defense, although said statute was not specifically set up in formal pleadings. *Gilbert v. Comstock*, 13 Week. Dig. 166. But an executor is not bound to give notice of his proceedings to his *cestui que trust*. *Mayer v. Gilligan*, 2 State Rep. 702.

In case of collusion between the administrator and others interested with him to fasten a stale claim on the defendant, heirs who have been made parties defendant may effectually interpose the defense of the statute of limitations, or presumption of payment from lapse of time. *Malloy v. Vanderbilt*, 4 Abb. N. C. 127; followed in *Pangburn v. Miles*, 10 id. 42; *Butler v. Johnson*, 41 Hun, 206. Pending a reference under the statute the court may, on motion, order that other persons, whose presence is necessary to a complete determination of the controversy, be brought in. *Mowry v. Peet*, 7 Abb. N. C. 195. The provisions of the Code of Civil Procedure as to how an account shall be pleaded, and what the penalty shall be for omitting to present a bill of items, *held* not to apply to a claim against an administrator referred under the statute, and hence that the referee properly admitted evidence of items fairly within the statement, though the claimant had furnished no bill of items, as demanded by the administrator. But where a claim against an administrator, limited by its terms to services in the general care and custody of the estate, had been referred, and no reference whatever was made to services in a professional capacity, it was held that the referee erred in allowing proof of claims for services as counsel. *Townsend v. N. Y. Life Ins. Co.*, 4 Civ. Pro. 398.

Where, upon a trial, the referee refused to compel plaintiff to furnish a bill of particulars, it was held to be a matter of discretion, and, in the absence of abuse of that discretion, not reviewable; besides that defendants, when the claim was presented, could have required it to be made more precise and particular before accepting or rejecting it. The provisions of the Revised Statutes, declaring that, in a reference of this character, "the same proceedings shall be had in all respects * * * as if the reference had been had in an action," authorizes the issuing of a commission to take testimony out of the State. *Paddock v. Kirkham*, 102 N. Y. 597; *Matter of Weller*, 4 Hun, 195. Where a claim was presented to an executor, which was rejected by him, and a reference had, it was held unnecessary on the reference to prove a formal demand of payment before beginning the action. The report of the referee taking the claim out of the statute of limitations, sustained in the absence of a preponderance of proof on that point on behalf of defendant. *Parke v. Wait*, 7 Week. Dig. 179. After a contested claim has been submitted, and the parties have separated, it is too late for one of the parties to withdraw his claim. *Clowes v. Van Antwerp*, 4 Barb. 416; affirmed, 6 N. Y. 466.

Confirmation of report.—Where, upon a motion to confirm the report, the motion papers show beyond question a claim of a nature not referable, defendant may oppose the motion without making a case. *Godding v. Porter*, 17 Abb. 374. It is irregular to enter judgment without an order of the court. *Radley v. Fisher*, 24 How. 404. It must be confirmed, and judgment ordered thereon, or it must be set aside, in which case a new trial follows before the same referee, or another appointed in his place. *Coe v. Coe*, 37 Barb. 232. And when the referee's report has been set aside, and referee discharged, the Special Term may appoint a new referee without consent of the parties. *Masten v. Budington*, 18 Hun, 105. It seems that where a disputed claim against the estate of a deceased person is referred pursuant to statute, to preserve the right of review upon an appeal from the judgment entered upon the report of the referee, the party aggrieved must move at Special Term upon a case, or otherwise to set aside the report, or for a new trial, or must appear and oppose its confirmation, and take the proper exceptions. *Smith v. Viele*, 60 N. Y. 106 (1875). The proper method of moving for confirmation of the report, and the course to be pursued by the opposing party, is a matter of much discussion by the courts. *Somerville v. Crooks*, 9 Hun, 664 (1877), holds that when the report of the referee is complete on its face, that it requires formal confirmation, then the remedy for the aggrieved party for the correction of the errors alleged to have arisen upon the trial is to make a case as the foundation of an application to set aside the report, and previous cases are cited as follows: *Boyd v. Bigelow*, 14 How. 511; *Radley v. Fisher*, 24 id. 404; *Godding v. Porter*, 17 Abb. 374; *Coe v. Coe*, id. 86. As confirming that view, the court goes on to say: "The authority, so far as it exists upon the subject, sanctions a motion at Special Term upon a case before judgment to set aside the report, and then an appeal afterward from the judgment entered by the party." Then follows *Young v. Cuddy*, 23 Hun, 249 (1880), where it is held that the practice as laid down in *Somerville v. Crook*, *supra*, is correct, except that it intimates that it is unnecessary to move to set aside the referee's report, and further holds that the court can set aside the report on appeal, and so orders.

In the same volume, at page 393, in *Kellogg v. Clark* (1881), it is held that a party who appeals, and unsuccessfully opposes a motion for the confirmation of the report of a referee appointed pursuant to statute, to pass upon a claim against the estate of a deceased person, may appeal from the judgment entered thereon, without first

moving at Special Term for a new trial upon a case and exceptions. In *Schreyer v. Holborrow*, 12 Week. Dig. 223, it is held (1881), that before an appeal can be heard at General Term from the judgment entered on the report of the referee, the party defeated in the reference must move at Special Term to set aside the report, and appeal from the order denying that motion. *Raynor v. Lauw*, 28 Hun, 36, Hardin, J. (1882), all concurring, holds: "*Young v. Cuddy*, 23 Hun, 249, is in point upon the practice adopted in this case, and we, following it, must hold that the Special Term had power to set aside the report of a referee, and to order a new trial." Citing, also, 37 Barb. 232; 24 How. 404; 9 Hun, 665. It seems, therefore, that it is proper to move on notice, to confirm, and that confirmation is granted as of course. That a motion may then be made by the defeated party on a case and exceptions to set aside the report at Special Term, and, if the motion is denied, an appeal taken; or the defeated party may make a case, and appeal from the judgment without making a motion at Special Term, provided he appeared and opposed the confirmation. It is questioned in *Hatch v. Stewart*, 42 Hun, 164, whether the practice is not to appeal from the order of confirmation, and not from the judgment, but the case is considered on the merits, as the point was not raised by counsel. The decisions of the different courts on this point well illustrate the fact that in a multitude of counselors (courts?) there is safety.

Notice of Motion to Confirm Report.

SUPREME COURT.

<p>Margaret R. Elting <i>agat.</i> Lucas E. Schoonmaker, as Executor of, etc., of Catharine J. De Puy, deceased.</p>	}
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Please take notice that upon the report of Howard Chipp, Esq., referee, herein filed in Ulster county clerk's office, June 10, 1887, and on the papers and proceedings had heretofore in this matter, the court will be moved, at the next Special Term thereof, to be held in the City Hall in the city of Albany, on the 20th day of June, 1887, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order confirming said referee's report and for judgment thereon, and that upon the aforesaid papers, together with the evidence taken by the referee on the trial, his opinion, a copy of which is herewith served, and a certificate made by him that the claim made by defendant has been unreasonably resisted, an application will be made for an order charging the defendant with plaintiff's costs.

Yours, etc., D. M. DE WITT,

Attorney for Plaintiff.

To V. B. VAN WAGONEN, *Attorney for Defendant.*

* See, however, *Denise v. Denise*, 41 Hun, 9.

Order of Confirmation and for Costs.

At a Special Term of the Supreme Court, held in and for the State of New York, at the City Hall in the city of Albany, on the 20th day of June, 1887:

Present — Hon. Samuel Edwards, *Justice*.

Margaret Elting <i>agst.</i>	}
Lucas E. Schoonmaker, as Executor of, etc., of Catharine J. De Puy, deceased.	

On reading and filing the report of the referee herein, dated June 10, 1887, and filed in Ulster county clerk's office on that day, together with the certificate of said referee and his opinion, and on the papers and proceedings had in the matter, and on due proof of service of notice of motion on V. B. Van Wagonen, Esq., attorney for defendant: Now, after hearing D. M. Dewitt, of counsel for plaintiff, in favor of the motion, and V. B. Van Wagonen, of counsel for defendant, opposed, it is ordered that the report of the referee herein be and is hereby in all things confirmed, and judgment is ordered for plaintiff thereon, and it is further ordered that the plaintiff recover his taxable costs and disbursements herein, as in an action.

SAMUEL EDWARDS,

Enter in Ulster county.

Justice Supreme Court.

Notice of Motion to Set Aside Confirmation on Case.

SUPREME COURT.

Margaret Elting <i>agst.</i>	}
Lucas E. Schoonmaker, as Executor of, etc., of Catharine J. De Puy, deceased.	

Please take notice that on the referee's report and accompanying papers, and all proceedings heretofore had in this cause, and on the case and exceptions herewith served, this court will be moved, at a Special Term thereof, to be held at the chambers of Mr. Justice Ingalls, at Troy, on the 12th day of July, 1887, for an order setting aside and vacating the report of the referee, herein filed, June 10, 1887, and the order of confirmation granted thereon June 20, 1887, or for such other or further relief as to the court may seem just.

Yours, etc.,

V. B. VAN WAGONEN,

Attorney for Defendant.

To D. M. DE WITT, *Attorney for Plaintiff.*

Costs. — It is said in *Van Sickler v. Graham*, 7 How. 208, and *Avery v. Smith*, 9 id. 349, that the executor or administrator, if successful, is not entitled to costs; that he can only have disbursements. But in *Munson v. Howell*, 12 Abb. 79, and *Radley v.*

Fisher, 24 id. 404, it is held that where the report is in favor of the executor or administrator he is entitled to costs, as in an action. Costs are not allowed against an executor or administrator unless where the demand was duly presented, it has been unreasonably resisted or neglected. *Roberts v. Ditmas*, 7 Wend. 522; *Carhart v. Blaisdall*, 18 id. 531; *Linn v. Clow*, 14 How. 508; *Lansing v. Cole*, 3 Code R. 46; *Boyd v. Wilkin*, 23 How. 136; *Fredenburgh v. Biddlecome*, 17 Week. Dig. 25. If a claim be presented to an executor, and rejected before the publication of notice to creditors, and the plaintiff subsequently recovers the same by suit, he is entitled to costs, and the fact that he was allowed to amend his complaint on the second trial does not affect his right to costs. *Field v. Field*, 77 N. Y. 294. To same effect, *Brinker v. Loomis*, 43 Hun, 247. Plaintiff can only recover costs against executors or administrators upon the demand which was presented to such executor, and payment unreasonably resisted or rejected, or when the defendant, on presentment, refused to refer it. *Kahnweiler v. Smith*, 6 State Rep. 241; *Beeden v. Knowlton*, 3 Sandf. 768; *Buckhout v. Hunt*, 16 How. 407; *Stephenson v. Clark*, 12 id. 282; *Horton v. Brown*, 29 Hun, 654. The plaintiff can only recover costs when he recovers on substantially the claim presented to the executor. *Genet v. Binnsse*, 3 Daly, 239; *Wallace v. Markham*, 1 Denio, 671. The claimant should offer to refer if he wishes to charge the executor with costs. *Proude v. Whiton*, 15 How. 304; *Buckhout v. Hunt*, 16 id. 407. It cannot be said that the claim is unreasonably resisted where a set-off is established which plaintiff had refused to allow, or the amount demanded is materially reduced. *Robert v. Ditmas*, 7 Wend. 522; *Woodin v. Bagley*, 13 id. 453; *Walrath v. Van Duzen*, 1 Den. 278, n.; *Comstock v. Olmstead*, 6 How. 77; *Russell v. Lane*, 1 Barb. 519; *Pinkernelli v. Bischoff*, 2 Abb. N. C. 107; *Daggett v. Mead*, 11 id. 116. A reduction from \$1,000 to \$350 is a material reduction, and prevents recovery of costs by plaintiff, *Cruikshank v. Cruikshank*, 9 How. 350; or from \$5,000 to \$3,000. *Buckhout v. Hunt*, 16 id. 407. So is a reduction to one-fifth of the demand, *Russell v. Lane*, 1 Barb. 519; but not a reduction of one-fifth. *Fort v. Gooding*, 9 id. 388. The certificate of the referee, before whom the trial took place, that the defendant, before the commencement of the action, refused to refer the claim, is *prima facie* conclusive evidence, and a fact proper to be certified. The facts may, in addition, be shown by affidavits. *Ely v. Taylor*, 5 State Rep. 127.

The refusal of an executor to pay a claim largely exceeding in amount a bill previously rendered is not unreasonable, so as to charge the estate with the costs of an unsuccessful defense. *Harrison v. Ayres*, 18 Hun, 336. Where the administrators had good reason to suppose there was a valid defense to the claim in whole, or a material part of it, and probably the defense interposed would have been successful at the trial if she could have procured her witnesses, the claim cannot be considered as unreasonably resisted. *Stephenson v. Clark*, 12 How. 282. Where plaintiff presented a bill for services rendered decedent, charging \$3 per week for services, and the referee allowed her \$2 per week, and also found that the defendants acted with prudence and good faith in resisting the claim, *held*, that plaintiff is not entitled to costs, but her rights were limited to referee's and witnesses' fees and disbursements. *Pursell v. Fry*, 19 Hun, 595. A large reduction of the balance claimed by plaintiff's bill justifies resistance. *Overheiser v. Morehouse*, 16 Abb. N. C. 208; *Webster v. Nichols*, 21 Week. Dig. 566. It is not unreasonable for the executrix, a sister of claimant, where the value of board is in dispute, to insist that the amount to be paid shall be determined by a reference. *Overheiser v. Morehouse*, *supra*. Where a referee found in favor of claimant, except as to the method of computing interest, *held*, that the claim was unreasonably resisted. *Hyland v. Carpenter*, 20 Week. Dig. 261. A case of unreasonable resistance is not made out where the statute of limitations was relied on as a defense to an action on a note, and a payment of the intestate during his life-time, and unknown to the executor, was relied upon by the plaintiff to take the case out of the statute. *Chesebro v. Hicks*, 66 How. 194. It is not unreasonable to resist where the affairs of decedent are in a complicated condition, and counter-claims believed to exist, and where the recovery was much less than the amount claimed. In such case there is no bad faith in defending, but much to justify inquiry and examination. *Jackson v. Myres*, 103 N. Y. 666; 3 State Rep. 656.

There are no grounds for giving costs against the estate of a deceased person, except those mentioned in the statute. *Fort v. Gooding*, 9 Barb. 388; *Van Vleeck v. Burghs*, 6 id. 341. A refusal to arbitrate is not sufficient ground for charging the executor with costs. *Cruikshank v. Cruikshank*, 9 How. 350; *Swift v. Blair*, 12 Wend. 278. Costs cannot be allowed on the ground that the executor neglected to give notice to creditors to present their claims. He is not bound to give it. *Bullock v. Bogardus*, 1 Den.

276; *Russell v. Lane*, 1 Barb. 519; *Van Vleeck v. Burroughs*, 6 Barb. 341; *Fort v. Gooding*, 9 id. 388; *Snyder v. Young*, 4 How. 217; *Comstock v. Ohnstead*, 6 id. 77; *Knapp v. Curtis*, 6 Hill, 386. Costs cannot be allowed by the referee; they can only be granted by the court. *Ely v. Taylor*, 5 State Rep. 27; *Morgan v. Skidmore*, 3 Abb. N. C. 92; *Smith v. Randall*, 67 Barb. 377; *Mersereau v. Ryerse*, 12 How. 300; *Bailey v. Bergen*, 5 Hun, 555; contra, *Wetmore v. Peck*, 19 Alb. L. J. 400. If costs are included in the judgment without leave of the court, they will be stricken out. *Snyder v. Young*, 4 How. 217. Contra, if the right to costs is clear. *Hees v. Nellis*, 65 Barb. 440. If the claim is established, it is not discretionary with the court to refuse costs, if the executor has refused to refer. *Rooney v. Lennon*, 3 Law Bull. 101; *Brinker v. Loomis*, 43 Hun, 247; *Snyder v. Snyder*, 26 id. 324. Where executors who were directed by the will of decedent to compensate plaintiff for care of the testatrix, resisted the bill rendered by plaintiff therefor, and the whole bill was allowed by the referee, it was held plaintiff was entitled to costs. *Darling v. Halsey*, 2 Abb. N. C. 105. But although the claim of a creditor was duly exhibited and properly presented to the testator's executor before suit brought, and the defendant was defeated in the end, yet the defense interposed was reasonable and proper, costs will not be awarded to the plaintiff. *Jackson v. Myers*, 3 State Rep. 655. Extra allowance cannot be made, it being a special proceeding. *Mowry v. Peet*, 13 Week. Dig. 16.

Where the report is for the claimant, he is entitled against the executors to the necessary disbursements of fees of officers allowed by law, including compensation of referees, although the court may have adjudged he is not entitled to costs. *Newton v. Sweet*, 4 How. 134. This is so since the Code and the Repealing Act. *Larkin v. Mazon*, 3 State Rep. 642; 103 N. Y. 680. Following *Krill v. Brownell*, 40 Hun, 72; *Sutton v. Newton*, 15 Abb. N. C. 452; *Hall v. Edmunds*, 67 How. 202, and *Overheiser v. Morehouse*, 16 Abb. N. C. 208. And overruling *Miller v. Miller*, 32 Hun, 481, and *Daggett v. Mead*, 11 Abb. N. C. 116. The same conclusion as in 103 N. Y., *supra*, was reached in *Hatch v. Stewart*, 42 Hun, 164. Where a notice was served offering to refer a claim, and stating that an omission to appoint a time for meeting to have a referee agreed on, would be regarded as a refusal to refer, held, that a notice served in response, that the claim was withdrawn when it was not, was such a refusal to refer as to entitle plaintiff to costs on recovery

in an action. *Wilkinson v. Littlewood*, 67 How. 474. The right of the court under the Code to allow costs, section 1836, in actions against representatives of a decedent's estate, where they have refused to pay the claim, or any part of it, is not affected by the fact that the amount claimed in the account was larger than the amount claimed in the complaint. Where it appears that, upon presentation of the claim, the defendants not only refused to pay, but to refer, it is not essential to entitle plaintiff to costs, to show that after the refusal he made an offer of reference before commencement of the action. *Carter v. Beckwith*, 104 N. Y. 236.

CHAPTER XXVI.

SALE OF REAL ESTATE OF RELIGIOUS CORPORATIONS.

The statute authorizing religious corporations to convey real estate by order of the court was first passed in 1806, and subsequently re-enacted in 1813, and is now part of the Revised Statutes, vol. 2, 7th edition, page 1661.

Chancellor may permit a corporation to sell its real estate—Proviso.

§ 11. *And be it further enacted*, That it shall be lawful for the chancellor of this State, upon the application of any religious corporation, in case he shall deem it proper, to make an order for the sale of any real estate belonging to such corporation, and to direct the application of the moneys arising therefrom by the said corporation to such uses as the same corporation, with the consent and approbation of the chancellor, shall conceive to be most for the interest of the society to which the real estate so sold did belong, provided that this act shall not extend to any of the lands granted by this State for the support of the gospel.

Jurisdiction.—The history of legislation on this subject, in England as well as in this State, is considered in *De Ruyter v. The Trustees of St. Peter's Church*, 3 Barb. Ch. 119, and it seems that at common law religious corporations had a right to alienate their real estate in the same manner as other corporations, until the time of Elizabeth, when statutes were passed restraining the alienation of real estate by such corporation, and these restrictions were held to be part of the common law of this State, although not re-enacted here. It is also held in *Montgomery v. Johnson*, 9 How. 232, that the common-law principle, that corporations, unless restrained by charter or statute, have power to sell, co-extensive with that of natural persons, does not apply to religious corporations. See, however,

10 Abb. (N. S.) 484. In *Matter of Reformed Dutch Church of Saugerties*, 16 Barb. 237, the statute is construed as prohibiting alienation of church property except by order of the court. The same case reiterates the rule of the statute (Code of Civil Procedure, § 217), that the Supreme Court is vested with the powers conferred upon the chancellor by the statute. The County Court has jurisdiction under the provisions of section 340, subdivision 4, Code of Civil Procedure.

§ 340. [Amended, 1877.] The jurisdiction of each County Court extends to the following actions and special proceedings, in addition to the jurisdiction, power, and authority, conferred upon a County Court in a particular case, by special statutory provision:

* * * * *

4. To the custody of the person and the care of the property, concurrently with the Supreme Court, of a resident of the county, who is incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness; and to every special proceeding, which the Supreme Court has jurisdiction to entertain, for the appointment of a committee of the person or of the property of such an incompetent person, or for the sale or other disposition of the real property, situated within the county, of a person, wherever resident, who is so incompetent for either of the causes aforesaid, or who is an infant; or for the sale or other disposition of the real property, situated within the county, of a domestic religious corporation.

Power to order sale.—The Supreme Court has no power to direct or require the corporation to sell against its will. It may withhold its assent to the sale, and thus prevent the disposition of the property. This is the extent of its power. *Matter of Reformed Church of Saugerties*, *supra*. So the County Court has only the special jurisdiction conferred on the chancellor by the statute, to direct the sale and application of the proceeds of the property of a religious corporation. It cannot increase or enlarge the powers of the trustees to appoint a receiver to dispose of the proceeds. The court has no power to order a sale for the purpose of closing up the existence of the society and distributing its property. *Wheaton v. Gates*, 18 N. Y. 395. By section 263, subdivision 9, jurisdiction is given to entertain these proceedings to the superior city courts. The act of 1873, conferring power in special proceedings, having been repealed by chapter 417, Laws of 1877, jurisdiction of the court to order a sale depends upon the facts before it at the time of making the order, and cannot be upheld by proof that facts which would have justified the order existed but were not brought to its attention. *Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 73 N. Y. 82; affirming in part and reversing in part 41 N. Y. Super. 369. Religious corporations have no common-law right to

alienate their real estate, and to constitute a sale within the meaning of section 11. There must be a valuable consideration inuring to the corporation as such, therefore, an order of the Supreme Court, authorizing a conveyance founded upon a petition showing the only consideration for the contemplated transfer to be a benefit to the original corporators, is without jurisdiction, and a deed executed in pursuance thereof is void. *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street*, 46 N. Y. 131.

Application, by whom made.—It was held in *Wyatt v. Benson*, 23 Barb. 327, apparently upon the authority of *People v. Fulston*, 11 N. Y. 94, and *Robertson v. Bullions*, id. 243, that the application must be made by and in the name of the corporation, and that the court had no power to grant an order of sale upon the application of the trustees or otherwise than upon the application of the corporation; but in *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street*, 46 N. Y. 131, it is held that, under the act to provide for the incorporation of religious societies, the trustees of such a corporation are authorized to act in its behalf in taking the steps required for effecting a sale of its real estate, and their acts are binding upon it, although it does not appear that they had the express sanction or authority of a majority of the corporation. The same case is reported in 73 N. Y. 82, on a subsequent appeal. It is said *In re St. George's M. E. Church*, 21 Week. Dig. 81, that a meeting of the corporation and vote of approval is not necessary to a valid sale, citing cases above, and 13 Abb. 424; *Matter of St. Ann's Church*, 23 How. 255. It is, however, usual to have a vote of the corporation. *Matter of Second Baptist Church in Canaan*, 20 How. 324. The consent of all the pew-holders as such is not necessary to make out a case for leave for granting the trustees leave to sell a church edifice. *Matter of Brick Presbyterian Church*, 3 Edw. Ch. 155; *Matter of the Reformed Dutch Church*, 16 Barb. 237.

In what cases application to court necessary.—The authority of the court to make an order for sale of real estate of a religious corporation relates to cases where the absolute right and title to lands belonging to the corporation is to be sold, and such assent is not necessary in case of the sale of a pew where the right of the owner is limited. *Freligh v. Platt*, 5 Cow. 494; *Voorhees v. Presbyterian Church of Amsterdam*, 8 Barb. 137; S. C., 17 id. 104. No order is necessary to authorize the mortgaging of church property. *Lee v. Methodist Episcopal Church of Fort Edward*, 52 Barb. 116;

Manning v. Moscow Presbyterian Society, 27 id. 52; *South Baptist Society v. Clapp*, 18 id. 35. But see *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 11 Abb. (N. S.) 132.

A religious corporation may sell buildings severed from land without leave of the court. *Beach v. Allen*, 7 Hun, 441. An order of the court is not necessary to enable a religious corporation, owning a cemetery, to convey burial lots therein to individuals for purposes of sepulture. So held in *Copper's Case*, 7 Abb. N. C. 121; reversed on appeal without opinion, as *Coppers v. Trustees*, 21 Hun, 233. A grant of a right of burial upon church property does not require an order of the court. So held where the conveyance purported to convey the fee, but for specific purpose of burial. *Richards v. North-west Protestant Dutch Church*, 32 Barb. 42; *Matter of Reformed Church of New York*, 7 How. 476. In *Protestant Reformed Church of Rosendale v. Bogardus*, 5 Hun, 304, it is questioned whether the right of way over property belonging to the church is such an interest in land as requires the authority of the court for its sale by a religious corporation. It is not necessary to obtain the order of the court to authorize a change of location of church edifice. *Matter of Second Baptist Church of Canaan*, 20 How. 324. The act gives to religious corporations the unlimited right to convey real estate, provided the consent of the court is given, as required by the act. *The Reformed Protestant Dutch Church in Garden Street v. Mott*, 7 Paige, 77.

Application, how and where made. — The application is to be made at the court at Special Term, or the County Court, which is always in session for that purpose. It is by petition, and while it is not necessary to state that the corporation has voted in favor of a sale, as was held in *Wyatt v. Benson*, 23 Barb. 327, yet it is usual to make such statement in case that is the fact. *Matter of Second Baptist Society*, 20 How. 324. See 23 id. 285; 18 N. Y. 395; 46 id. 131, *supra*. A contract may be entered into before the order of sale is made, and it will be sufficient if the authority is obtained before the deed is made. *Congregation Beth Elohim v. Central Presbyterian Society*, 10 Abb. (N. S.) 484; *Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 30 How. 455. But it is not absolutely necessary for the petitioners to show that they have agreed with a purchaser. An order may be made directing a sale at a price not less than a sum named, and in case no purchaser is found at such price, sale cannot be had under the order. *Matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155. A corporation

has power to contract for sale before order of court is granted, subject to approval of the court. It is not necessary or desirable that the sanction of the court should precede the negotiation. *Bowen v. First Presbyterian Congregation*, 6 Bosw. 243. There is no provision in the statute requiring notice to be given of the proceedings, and hence the application may be made *ex parte*. The order may be granted upon the papers presented, or an order of reference may be granted to take proof of the fact set out in the petition, as was done in *Matter of Dutch Reformed Church in Saugerties*, 16 Barb. 238.

Precedent for Petition.

SUPREME COURT.

In the Matter of the Petition and Application of the Reformed Dutch Church, in the town of Saugerties, for the sale of its real estate.

To the Supreme Court of the State of New York :

The petition of Cornelius Van Santvoord, minister of said church, and president of the consistory thereof, of Luther Lafin, John Field, Benjamin Myer and Garret Mynderse, elders and members of the consistory, and of John Kiersted, John Nairn, Henry Huyck and John J. Gillespy, deacons and members of the consistory, respectfully shows to the court that they are officers as aforesaid of the Reformed Dutch Church of the town of Saugerties, in the county of Ulster, and together compose the consistory of said church, and the whole thereof.

Your petitioners further show that the said church was duly incorporated on or about July 11, 1826, under an act entitled "An act to provide for the incorporation of religious societies," passed April 5, 1813, under the name of "The Minister, Elders and Deacons of the Reformed Church in the Town of Saugerties." That said corporation is the owner and holder of certain property situate in the village of Saugerties, in said county, used and occupied heretofore by it as a house of worship, and which is bounded and described as follows (here insert description).

Your petitioners further show that there is no assessment, debt or incumbrance on any, or all of said property.

Your petitioners further show that since the building of the church on the said church property, the said village and town of Saugerties have largely increased in population, insomuch that two other churches of the same denomination have since been incorporated in said town, and that many of the persons who were formerly attendants at said church, and pewholders therein, have joined other churches in the localities in which they reside, and do not, and have not for many years, contributed to the support of the church at Saugerties, and, by reason of their ownership of the pews in said church, no moneys can be realized by the corporation by letting pews to other persons. That the church edifice on the property of said corporation

is uncomfortable and inconveniently constructed, and in bad repair, and that, to put it in proper repair, would necessitate the expenditure of a considerable sum of money. That the edifice is not sufficiently large, nor is it well located, and that it is with extreme difficulty that sufficient moneys can be raised for the support of the minister and payment of current expenses on account of the manner in which said pews are held and owned, and the said defects in said building, the said pews not being subject to tax or assessment for the support of the church.

Your petitioners further show that at a meeting of the pewholders and members of said church, held on due notice from the pulpit on the 7th day of May, 1880, it was determined, after mature deliberation, to build a new church edifice upon another site, which was thereafter decided upon, and a contract was entered into for building the same. That said church, when completed, will meet fully the wants and necessities of the corporation by reason of its more central location, and greater accommodations, and that the said corporation does not desire to maintain two places of worship, and that the said church property will not be needed in any way for use of the said corporation, your petitioner.

That the value of said property is about the sum of \$2,500, and that the moneys which may be realized therefor are necessary for the purpose of completing the new edifice.

Your petitioners further show that, at a meeting of the consistory, held and duly called at the lecture-room of said church on the 13th day of December, 1851, at which all the members were present, it was resolved by a majority vote of said consistory: "That an application be made to the proper court for an order to sell the old church edifice and lots on which it is located, and the avails thereof be applied as the court directs." Wherefore your petitioners pray that an order may be granted authorizing your petitioners to sell the old church edifice, and lots on which it is located, and that the avails of such sale be applied to the completion of the new church edifice, now being built, and the necessary appurtenances thereto, for the uses of the said corporation, or for such other or further relief as to the court may seem proper. And your petitioners will ever pray.

C. VAN SANTVOORD,

Minister and President of Consistory.

LUTHER LAFLIN,
BENJAMIN MYER,
JOHN FIELD,
GARRET MYNDERSE,

JOHN NAIRN,
JOHN KIERSTED,
HENRY HUYCK,
JOHN J. GILLESPIE,

Elders.

Deacons.

(Attach seal of corporation and add verification as to pleading.)

Precedent for Order of Reference.

At a Special Term of the Supreme Court, held at the judge's chambers, in the city of Albany, June 27, 1882:

Present — Hon. Charles R. Ingalls, *Justice*.

(Title.)

On reading and filing petition of the minister, elders and deacons of the Reformed Dutch Church, at Saugerties, for leave to sell their

real estate, now, on motion of B. M. Coon, counsel for petitioner, and after hearing E. Whitaker, counsel for persons opposing,

Ordered, that Charles J. Buchanan, Esq., of Albany, is hereby appointed a referee to take proofs of the facts set forth in said petition, or any facts petitioner may produce in relation thereto, or their right to sell the property set forth in said petition, and apply the avails of the sale. And also the proof of any facts in opposition thereto on the part of any person interested in said property who may choose to appear and oppose. The said referee to report all such testimony and exhibits and file them with all convenient speed in the Ulster county clerk's office.

Enter in Ulster county.

C. R. INGALLS,

Justice Supreme Court.

Order for sale and distribution of proceeds.—The sale may be made by the trustees, or by an officer appointed by the court. *De Ruyter v. St. Peter's Church*, 3 N. Y. 240. In case of the sale of the property of a religious corporation, with the assent of the court, the avails are not to be distributed among the original contributors and pewholders, but they are to be applied to such uses as the corporation, with the consent and approval of the court, shall conceive to be most for the interests of the society. It is the right of a church corporation to designate the object for which the moneys arising from a sale of its real estate shall be used. If the object thus designated meets the approval of the court, the appropriation will be made. If not, the money must be retained by the corporation until it can make such an application of it as will meet with the consent and approbation of the court. The court may withhold its assent, but it cannot direct the appropriation of the moneys in any specified manner. *Matter of Reformed Church of Saugerties*, 16 Barb. 237. The trustees have no right or authority to distribute the property of the society among the individual members, or any class of them, nor can it be conferred by a vote of the majority of the members and the order of the court. The court cannot approve of any plan for the distribution of the proceeds of the sale of the real estate, which does not regard the interest of the society as an organization to continue for the purposes of its creation. Where it appears from the application that the sale is sought for the purpose of distributing the proceeds among the pewholders, the court has no jurisdiction to grant the application, and its order is inoperative. *Wheaton v. Gates*, 18 N. Y. 395; cited *Madison Av. Baptist Church v. Baptist Church in Oliver St.*, 73 id. 140. It seems that the only way in which a religious corporation can divide its real estate, and vest a portion thereof in a part of its congregation set off from the parent organization, is by legislative enact-

ment. *Reformed Church v. Schoolcraft*, 5 Lans. 210; affirmed, 65 N. Y. 135.

Precedent for Referee's Report.

(Title.)

To the Supreme Court of the State of New York:

The undersigned, to whom it was referred to take proof of the facts set forth in the petition in this matter, and such proof as might be presented by any party in interest, do report that I have been attended by B. M. Coon, Esq., on behalf of petitioners, and E. Whittaker, Esq., opposed, as counsel for the respective parties, and that I have from time to time heard the proofs and allegation of the parties, and that the exhibits and the proofs taken before me are herewith filed in Ulster county clerk's office.

All of which is respectfully submitted,

CHARLES J. BUCHANAN,

Referee.

Dated June 12, 1882.

Precedent for Order of Confirmation and Distribution.

At a Special Term of the Supreme Court, etc.

Present — Hon. Charles R. Ingalls, *Justice*.

SUPREME COURT.

In the Matter of the Petition and Application of the Reformed Dutch Church, in the town of Saugerties, for the sale of its real estate.

On reading and filing the petition and other papers in this matter, as also the report of Charles J. Buchanan, referee, to whom it was referred to take the testimony in this matter and report the same to this court, which petition prays, among other things, for authority to sell the old church edifice belonging to the Corporation of the Ministers, Elders and Deacons of the Reformed Dutch Church of the Town of Saugerties, and the lots on which it is located, and the lecture-room which has been used in connection therewith, and to appropriate the avails of said sale to the completion of the new church edifice erected by the said society and mentioned in the said petition, and for the necessary fixtures, furniture and appurtenances thereof, as stated in said petition, and after hearing B. M. Coon in behalf of the petitioners and E. Whittaker, in opposition thereto, in behalf of the remonstrants, and mature deliberation being thereupon had, it is

Ordered, that the prayer of said petition be granted, and that the said corporation be, and it hereby is, authorized and empowered to sell the real estate, being the old church and lots and lecture-room and lot above referred to, and in said petition above referred to more particularly mentioned, at public or private sale, as they shall deem most expedient, and after such sale to make conveyances thereof to the purchaser, and to apply the moneys arising from said sale to the payment of their own costs and expenses of these proceed-

ings, and to such uses and purposes as are prayed for in the said petition and to the completion of said new church edifice and to the necessary fixtures, furniture and appurtenances thereof.

Enter in Ulster county.

C. R. INGALLS,

Justice Supreme Court.

Effect and validity of sale.—The order permitting the conveyance of real property by a religious corporation constitutes no estoppel in favor of a grantee who has parted with no consideration. *St. James' Church v. Church of the Redeemer*, 45 Barb. 356. The trustees of a religious corporation, making application to the court for leave to sell or mortgage its property, are not general but special agents, and if they act without authority the corporation is not estopped by the proceedings. *Moore v. Rector, etc., St. Thomas*, 4 Abb. N. C. 51. The trustees, however, in carrying out a contract of sale, have incidental power to agree to an extension of time for delivering the deed. *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. (N. S.) 484. Where a religious corporation sold real estate, under an order of the court, to a *bona fide* purchaser, and received from him the value of the property, *held*, that a member of the corporation could not set up against the sale that by reason of irregularities in the proceedings the corporation did not give a valid title. *Watkins v. Wilcox*, 4 Hun, 220; affirmed, 66 N. Y. 654, on other points.

Plaintiff and defendant, religious corporations, united, the former conveying all its property to the latter, which assumed all the debts and took the corporate name; defendant paid the debts, took possession of the property under a sale made by order of the court, and maintained religious services. In a suit for recovery of its real property by plaintiff, it was held that these facts did not show a sale, and, therefore, that the court had no jurisdiction to order the sale; that plaintiff could redeem, but only on repayment to defendant the sums advanced on former indebtedness, with interest from the time defendants ceased to possess the property, and such other terms as were equitable, as set out in the opinion. A conveyance *ultra vires*, by a religious corporation, of its real estate cannot be held valid because it has executed and delivered its deed and received consideration therefor. *Madison Av. Baptist Church v. Baptist Church Oliver St.*, 73 N. Y. 82. A sale of its real estate by a religious corporation subject to the payment of all liens thereon and all debts of the society, including the floating debt, *held* valid; the application for leave to the Supreme Court to make such sale having shown a necessity for such disposition of the property, and

that it was for the best interests of the society. *Lynch v. Pfeiffer*, 38 Hun, 603.

Statute.—For authority by parent church to convey property to church or chapel in manner prescribed by law for sale of real estate of religious corporations, see chapter 117, Laws 1879, amending chapter 122, Laws 1850.

See, as to power of sale, *In Re First Presbyterian Church of Buffalo*, 8 State Rep. 679.

CHAPTER XXVII.

PROCEEDINGS TO ACQUIRE LANDS FOR RAILROAD PURPOSES.

The proceedings to acquire title to lands for railroad purposes are held to be special proceedings. *New York Central R. R. Co. v. Marvin*, 11 N. Y. 276; *Matter of Lackawanna, etc., R. R. Co.*, 26 Hun, 592; *Matter of N. Y., W. S. & B. R. R. Co.*, 33 id. 231; *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145; *A. & S. R. R. Co. v. Dayton*, 10 Abb. (N. S.) 182; *Matter of Cortland, etc., Horse R. R. Co.*, 98 N. Y. 336; *Matter of New York & Harlem R. R. Co.*, id. 12, and are regulated by the provisions of chapter 140, Laws of 1850, known as the General Railroad Act, and the amendments thereto. The basis of the proceedings is the right of eminent domain, which existed prior to the Constitution, *Heyward v. Mayor of New York*, 7 N. Y. 314, but which is recognized by it. *Wallace v. Karlenowefski*, 19 Barb. 118. The limitations upon the right of eminent domain are that the use must be a public one, and that compensation must be made to the owner. *Beekman v. S. & S. R. R. Co.*, 3 Paige, 45; *Varick v. Smith*, 5 id. 137; *Einbury v. Conner*, 3 N. Y. 511; *Buffalo & N. Y. R. R. Co. v. Brainard*, 9 id. 100; *People v. Smith*, 21 id. 595. Railroads are regarded as a public use of property, although occupied and used by private corporations. *Matter of Townsend*, 39 N. Y. 171; *N. Y. & H. R. Co. v. Kip*, 46 id. 546.

The General Railroad Act gives to corporations created under it authority to acquire lands by the exercise of the right of eminent domain, both from individuals and from the State for its prospective as well as present uses, provided the necessity for such use in the immediate future is established beyond reasonable doubt. It seems, that as the exercise of this power is in derogation of individual right, it should be allowed only when the necessity clearly appears

and the proposed use is clearly embraced within the legitimate objects of the power. *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251. A railroad company, under the power delegated to it by the General Railroad Act to acquire lands for the purposes of its incorporation, has, to a large extent, the right to determine the measure of its wants, and to fix upon the location of land to be appropriated subject to the qualification that the purposes for which the land is taken are strictly within its charter, and the lands of private corporations are subject to the exercise of the right of eminent domain the same as individuals. *Matter of Petition of N. Y. C. & H. R. R. Co. v. The Metropolitan Gas-Light Co.*, 63 N. Y. 326.

That compensation shall be made to the owner of property taken for public purposes is provided for by the fifth amendment to the Constitution of the United States, and by article 1, section 6 of the Constitution of New York.

The act authorizing the condemnation of private property for public purposes must, however, be clear and explicit. If there are doubts as to the extent of the power after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to its exercise. *New York R. R. Co. v. Kip*, 46 N. Y. 546. And before the fee can be taken in the exercise of power of eminent domain, it must appear that such was the intention of the legislature, disclosed by the act. *Washington Cemetery v. Prospect Park*, 68 N. Y. 591. Nor, on the other hand, can the public be compelled to take a fee where an easement will suffice. *Jerome v. Ross*, 7 Johns. Ch. 315. The general principle is that all property is subject to the right of eminent domain, irrespective of the use to which it has been already applied or the different estates or interests held in it. *Pierce on Railroads*, 151, and cases cited. The language of the act, however, does not authorize a railroad corporation to subvert an appropriation of property to other public uses which are inconsistent with the use thereof for a railroad. *In Matter of City of Buffalo*, 68 N. Y. 171. It is held in *Matter of Rochester Water Commissioners*, 66 id. 413, that neither a private or municipal corporation can, under a general power to take lands for a public use, take from another corporation having the like power, lands or property held by it for a public purpose pursuant to its charter. The same principle is asserted in *Matter of N. Y. & B. R. R. Co.*, 20 Hun, 201; *In re Boston & Albany R. R. Co.*, 53 N. Y. 574; *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 id. 137; *Brooklyn Park Commissioners v. Armstrong*, 45 id. 234; *N. Y. City*,

etc., *R. R. Co. v. Central Union Telegraph Co.*, 21 Hun, 261; *Prospect Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552. See Mills on Eminent Domain, § 45. The land, when acquired, may be used for the legitimate business of the company. Pierce on Railroads, 159, and cases cited. In exercising the power of eminent domain the statute must be strictly followed. *Adams v. S. & W. R. R. Co.*, 10 N. Y. 328; *In re City of Buffalo*, 68 id. 171. And the title of the company vests only on payment of the compensation awarded. *Clarkson v. H. R. R. Co.*, 12 N. Y. 304; *Ballou v. Ballou*, 78 id. 325. And on complying with the conditions precedent, as provided by the award, the Supreme Court has power to put the petitioner in possession of the property condemned. *Matter of Application of H. R. R. Co.*, 60 N. Y. 116. The statute cited is chapter 140, Laws of 1850, known as the General Railroad Act, except where otherwise indicated.

CHAPTER 140, LAWS OF 1850.

§ 28. *Additional powers conferred.*—Every corporation formed under this act shall, in addition to the powers conferred on corporations in the third title of the eighteenth chapter of the first part of the Revised Statutes, have power:

1. *May enter upon lands for purpose of survey.*—To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous routes; and for such purpose by its officers or agents or servants to enter upon the lands or waters of any person, but subject to the responsibility for all damages which shall be done thereto.

2. *May hold voluntary grants of real estate.*—To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only.

3. *May purchase, hold and use real estate; reference to Indian lands.*—To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, and the stations and other accommodations necessary to accomplish the object of its incorporation; but nothing herein contained shall be held as repealing or in any way affecting the act entitled "An act authorizing the construction of railroads upon Indian lands," passed May twelve, one thousand eight hundred and thirty-six.

4. *Construction of road.*—To lay out its road, not exceeding six rods in width, and to construct the same, and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor, as provided in this act for lands for the use of the company.

An act which authorizes an entry upon a person's land for the purpose of making the preliminary or final surveys for a railroad, before compensation is made, is not unconstitutional, if the act makes suitable provision for compensation in case the land shall subse-

quently be taken for such railroad. *Polly v. Saratoga & Washington R. R. Co.*, 9 Barb. 449. A railroad company can derive title only by consent of owner of the fee, or in case of appraisal. *Craig v. Rochester City & B. R. R. Co.*, 39 Barb. 494. And where land is taken subject to a condition the grant becomes inoperative on violation of that provision. *Douglass v. N. Y. & Erie R. R. Co.*, Clarke's Ch. 174. But a grantor may lose his right to insist upon a condition by laches. *Ludlow v. N. Y. & H. R. R. Co.*, 12 Barb. 440. And a conveyance without restriction estops a grantor from claiming damages by reason of the land being used for railroad purposes. *Matter of Utica, Chenango & Susquehanna Valley R. R. Co.*, 56 Barb. 456. A railroad company may agree, as part of compensation for lands purchased, to maintain a street thereon, and such agreement will be valid and binding. *Tinkham v. Erie R. R. Co.*, 53 Barb. 393. The statute authorizes a railroad company to acquire land for its track and other necessary purposes by voluntary purchase or by condemnation, and an agreement made on purchase of rights of way to pay therefor in bonds of the purchasing corporation is valid, although the line is not finally located on the line proposed to be purchased, and is, in fact, subsequently located on a different line; this change of purpose does not affect the question of corporate power. *Munson v. Syracuse, Geneva, etc., R. R. Co.*, 3 State Rep. 31. The question as to what property is necessary for the purposes of the corporation is determined by its necessities, and it is a question of fact whether, all things being considered, property is desired in good faith for the purposes contemplated by the charter. *Moss v. Averell*, 10 N. Y. 462. Section 28, authorizing companies formed under the act of 1850 to lay out their roads, "not exceeding six rods in width," relates to the first laying out and first construction of a railroad, and must be read in connection with section 21 of the act as amended, which permits lands to be subsequently taken by a company in addition to what it was originally entitled to acquire when laying out its road, if such additional lands shall be required for the purposes of the corporation. The act must be so construed as to give effect to its provisions, and not defeat the intention of the legislature. Where a railroad company is authorized by its charter to acquire by purchase such real estate as may be necessary for the construction of its road, it is presumed that lands deeded to it are acquired for that purpose. By a deed purporting to convey a fee it acquires a title in fee, and where the land is no longer needed for its purposes it has the right to sell and convey the

same. *Yates v. Van De Bogart*, 56 N. Y. 526. An easement in lands of another corporation may be acquired *in invitum*, when it may be enjoyed without detriment to the public, or without interfering with the use to which the lands are devoted. So, also, lands held by a corporation or public body, but not used for or necessary for a public purpose, may be taken, as if held by an individual owner. *Matter of Rochester Water Commissioners*, 66 N. Y. 413.

§ 22. *Map of route of railroad to be filed before construction; notice to occupants of lands; objections to route, how made; the application to the Supreme Court to be accompanied with map of proposed alterations; court to appoint commissioners to examine who may affirm or alter route; engineer on commission to concur; determination map and testimony to be filed; appeals; court may affirm route or adopt alteration; the pay of commissioners.*—Every company formed under this act, before constructing any part of their road into or through any county named in their articles of incorporation, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company, or a majority of the directors, and filed in the office of the clerk of the county in which the road is to be made, or in the office of registers in counties where there is a register's office. The company shall give written notice to all actual occupants of land over which the route of the road is so designated, and which has not been purchased by or given to the company of the time and place such map and profile were filed, and that the route designated thereby passes over the land of such occupant. Any occupant or owner of land over which such route passes, feeling aggrieved by the proposed location, may, within fifteen days after receiving written notice as aforesaid, give ten days' notice in writing to such company, and to the owners or occupants of lands to be affected by any proposed alteration, of the time and place of an application to a justice of the Supreme Court in the judicial district where such lands are located by petition duly verified for the appointment of commissioners to examine the said route; such petition shall set forth the petitioner's objections to the route designated by the company, shall designate the route to which it is proposed to alter the same, and shall be accompanied by a survey map and profile of the route as designated by the company, and of the proposed alteration thereof, copies of which petition, map, survey and profile shall be served upon the company and said owners or occupants with the notice of the application. If the said justice shall consider sufficient cause therefor to exist, he may, after hearing such parties as shall appear, appoint three disinterested persons, one of whom must be a practical civil engineer; commissioners to examine the route proposed by the company and the route to which it is proposed to alter the same, and after hearing the parties to affirm the route originally designated, or adopt the proposed alteration thereof as may be consistent with the just rights of all parties and the public, including the owners or occupants of lands upon the proposed alteration, but no alteration of the route shall be made except by the concurrence of the commissioner, who is a practical civil engineer, nor shall an alteration be made which will cause greater damage or injury to lands or materially greater length of road than the route designated by the company would cause, nor which shall substantially change the general line adopted by the company. The determination of the commissioners shall within thirty days after their appointment be made and certified by them, and the certi-

ificate with the petition, map, survey and profile, and any testimony taken before them, be filed in the office of the register of the county in counties where there is a register, otherwise in that of the county clerk. Within twenty days after the filing of such certificate, any party may, by notice in writing to the others, appeal to the Supreme Court from the decision of the commissioners, which appeal shall be heard and decided at the next General Term of the court held in any judicial district in which the lands of the petitioners, or any of them, are situated, for which the same can be noticed according to the rules and practice of said court. On the hearing of such appeal the court may affirm the route proposed by the company or may adopt that proposed by the petitioner. Said commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment; and if the route of the road as designated by the company is altered by the commissioners, and their decision is affirmed on appeal (if an appeal be taken), the company shall refund to the applicant the amount so paid.

LAWS OF 1871, CHAPTER 560.

§ 3. *Maps, surveys, etc., when to be filed or recorded in register's office; transfer and refiling authorized.*— Whenever in said act, any map, survey, profile, reports, certificates or other paper, is directed to be filed or recorded in the office of the county clerk, the same shall be filed or recorded in the office of the register of the county, provided there be a register's office in said county, and all maps, profiles, surveys, reports, certificates or other papers, which have pursuant to the provisions of said act been heretofore filed or recorded in the office of the clerk of any county in which there is a register, shall be, within thirty days after the passage of this act, transferred to the office of such register, and shall be by him refiled or recorded as of the date of the original filing or record.

§ 23. *Directors may change route; survey; may acquire land; alteration in city or village; compensation; provide alteration when bonds have been issued.*— The directors of every company formed under this act may, by a vote of two-thirds of their whole number, at any time alter, change the route, or any part of the route of their road or its termini or locate the said route, or any part thereof, or its termini, in a county adjoining any county named in the articles of association, if it shall appear to them that the line can be improved thereby; and they shall make and file in the clerk's office of the proper county a survey, map and certificate of such alteration or change, and shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located there in the first instance; and no such alteration shall be made in any city or village after the road shall have been constructed, unless the same is sanctioned by the vote of two-thirds of the common council of said city or trustees of said village; and in case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company; nothing herein shall be construed to authorize the change of either terminus to any other county than one adjoining that in which it was previously located, nor the reduction of the amount of capital stock per mile below that now required by law. All the provisions of this act relating to the first location and to acquire title to land shall apply to every such new or altered portion of the route. Nor shall the provisions of this section authorize the alteration of the route or terminus of any railroad in any town, county or municipal corporation which has issued bonds, or any town which may be bonded but whose bonds have not yet been issued or sub-

scribed for, and taken any stock or bonds in aid of the construction of such railroad without the consent in writing of and subscribed by a majority of the tax payers appearing upon the last assessment-roll of said town, county or municipal corporation. But it shall not be necessary to obtain the consent of such tax payers in order to authorize an extension to a new terminus, where such terminus, after the change, will remain in the same village or city as theretofore. But nothing herein shall be construed to authorize the abandonment of any portion of the track of any railroad as described in its articles of association.

The right to written notice, as required by this section, is a right given by statute, and it is not for the corporation or the court to deprive him of it. If the occupant does not take the statutory steps within fifteen days to secure a review or alteration of the route, the route may be considered settled and his right thereafter to object lost. Such notice to occupant must be served before given notice of application for appointment of commissioners of appraisal. Presenting such petition is not a sufficient compliance with the requirement of the statute. If a railroad company does not comply with the necessary pre-requisites for obtaining the appointment of commissioners, it does not secure the right to have the property condemned against the wishes of the owners. *Matter of N. Y. & Boston R. R. Co.*, 62 Barb. 35. The statute requires notice to be given only to actual occupants of the land proposed to be taken. *Matter of N. Y., Lackawanna, etc., R. R. Co.*, 33 Hun, 148.

A notice signed by a person describing himself as an officer of the company is sufficient. *Matter of Cortlandt, etc., Horse R. R. Co.*, 31 Hun, 72. The examination of the route is to be made by the commissioners; the merits will not be passed on upon an application for their appointment. *Matter of Norton*, 42 How. 228. It seems commissioners may be appointed *ex parte* to change route. *Matter of Hartman*, 9 Abb. (N. S.) 124. Fifteen days' notice must be given before commissioners can be appointed. *Wallkill Valley R. R. Co. v. Norton*, 12 Abb. (N. S.) 317. If the location is fixed in the map, and profile is not changed by a commission provided by law, it remains the route of the railroad. *Matter of Central R. R. of Long Island*, 1 T. & C. 421.

Where a railroad company was authorized by statute to construct its road over certain streets and avenues, *held*, that this constituted a practical location of the route, and dispensed with notice and filing of the map. The map as filed showed a single line running along the road, and a notice upon it stated that the central line of the railroad track was eighteen feet from the westerly line of the road. *Held*, that this showed with sufficient certainty the location

of the road and the land to be taken. *Matter of Coney Island, etc., R. R. Co.*, 12 Hun, 451.

Certificate by Officers to Map and Profile.

We, the undersigned, do hereby certify that this is a correct map and profile of the proposed location of the New York, West Shore and Buffalo railroad in Ulster county, from Orange county line to Rondout creek, filed in pursuance of the General Railroad Act, dated April 2, 1850, and of the amendments thereto.

THEODORE HOUSTON, *Vice-President*,
CHARLES B. STUART, *Engineer in Chief*,
New York, West Shore and Buffalo Railway Co.

Witnessed by

EDWARD LANG.

Notice to Occupant of Proposed Route.

To FREDERICK O. NORTON, *Occupant of lands over which proposed route of Wallkill Valley railroad passes* :

Take notice that a map and profile of the route intended to be adopted by the Wallkill Valley Railroad Company in the county of Ulster, certified by the president and engineer of said company, in due form of law, was on the 25th day of August, 1882, duly filed in the office of the clerk of the county of Ulster, and that the said route designated thereby passes over your lands.

Dated *September 1*, 1882.

THE WALLKILL VALLEY RAILROAD CO.

By SAMUEL G. DIMMICK, *Secretary*.

The map is sufficient if it shows the alignment and profile without showing all the connections, turnouts and switches. *People v. Brooklyn F. & C. I. R. R. Co.*, 89 N. Y. 75; affirming 12 Week. Dig. 375.

But a map of a proposed railway which shows but a single line, and gives no other information whatever, does not give full notice to owners or occupants of the proposed route, and is defective and ineffectual to enable the company to acquire land by compulsory proceedings or to complain of the acts of another thereon. *N. Y. & Albany R. R. Co. v. West Shore, etc., R. R. Co.*, 11 Abb. N. C. 386; citing *Matter of Long Island R. R. Co.*, 45 N. Y. 364; *Matter of Boston, etc., R. R. Co.*, 10 Abb. N. C. 104; and approving *Matter of N. Y. & Boston R. R. Co.*, 62 Barb. 85; S. C., 12 Abb. (N. S.) 21. The latter case was cited with approval. *Allen v. Utica R. R. Co.*, 15 Hun, 80. The mere filing of a map under section 22 does not definitely establish a route or exhaust the power of the company over the matter, or constitute a grant by the State of the special route described. It is the consent of parties evidenced by neglect to apply after actual notice, or else the legal ad-

judication which establishes the route. Nor is such a filing a dedication of lands to public use which will prevent another corporation by the right of eminent domain from exercising that right with reference to such lands without express grant. 11 Abb. N. C. 386, *supra*; distinguishing as to last point, *Matter of N. Y. Central, etc., R. R. Co.*, 77 N. Y. 248. It is held in *R. H. & R. R. Co. v. N. Y., L. E., etc., Co.*, 44 Hun, 206, S. C., 8 State Rep. 237, that when a corporation has made a map and profile of the route intended to be adopted by the company, and has caused the same to be duly certified and filed as required by section 22, it has acquired a vested and exclusive right to build, construct and operate a railroad on the line which it has adopted, subject to the right of other railroad companies to cross its track in the way and manner, and for the purposes provided by law. An existing railroad corporation, purchasing the property and franchises of another or former corporation, is not required to refile a map of the line which it thus acquires, where it buys a road already constructed and in existence. *People v. Brooklyn F. & C. I. R. R. Co.*, 89 N. Y. 75.

The statute, section 23, does not require, in order to a valid exercise of the power to change the location, a designation of the particular line to be occupied by the road; but when the directors have by a proper vote determined that the road shall be built upon a new route in a specified county, that is a location within the section. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 88 N. Y. 279; affirming 25 Hun, 556.

Where, on a proceeding on the petition of the land-owner for the appointment of commissioners to change the location of the route of a railroad as surveyed by the company, it appears by the testimony before the commissioners that the petitioner has failed to comply with the directions of the statute by giving notice of the application for the appointment of commissioners to an individual whose land, if the line of the railway be changed, would be crossed by the railroad, such proceeding is wholly void, and will be reversed on appeal from decision of the commissioners. Such an owner comes within the purview, letter and intent of the statute, which requires notice to be given the owners and occupants of lands to be affected by the proposed change of route. *Norton v. Wallkill Valley R. R. Co.*, 63 Barb. 77. See *People v. Tubbs*, 59 id. 401. No person is authorized to apply for the appointment of commissioners to examine the proposed route with a view to alter or change the same, except one whose lands have not been acquired by the company, and after

service on him of the written notice required to be given him by section 22, and he must feel aggrieved by the proposed route, and set forth his objections in his petition. The petitioners are to examine the proposed route and to hear the parties before deciding, and the decision must be confined to the rights of the parties heard, and consistent with the rights of the public. The statute does not contemplate that one land-owner upon a route can force a different location, not only over his own land but over that of his neighbors, and gives the commissioners no such power. *The People, ex rel. Erie, etc., R. R. Co., v. Tubbs*, 59 Barb. 401. The notice required by the statute must be personally served. It is questioned whether, where personal service is impracticable, the court would have the power, under the seventh subdivision of section 4, to direct service to be made in some other mode. *People, ex rel. Canandaigua, etc., R. R. Co. v. Lockport, etc., R. R. Co.*, 13 Hun, 211. Where commissioners are appointed under the provisions of section 22 their power over the proposed route is not restricted to that part of it which lies within the bounds of the lands of the party procuring their appointment, but they may make any alteration of the proposed route within the county which may be necessary to obviate such objections of the party aggrieved as they may deem well founded, and in exercising their power to change the proposed route it is the duty of the commissioners to complete the alteration so as to preserve the continuity of the line. They have no power to so change a portion of the proposed route as to leave it disconnected at either end with the other portions, and thus disconnect the road. The statute contemplates but one board of commissioners in each county, and all alterations in that county should be made by that board. When its work is completed the route through a county is established. *People v. Tubbs*, 49 N. Y. 356; affirming 59 Barb. 401, *supra*. In *Matter of Application of Lake Shore, etc., R. R. Co. to change the route of the N. Y., Lackawanna & W. R. R. Co.*, 89 N. Y. 442, it is questioned whether, when the proposed route of a railroad crosses the track of an existing company, the latter can apply for commissioners to change the route. But the question whether the new company has located its line over lands it cannot condemn for railroad purposes is not one properly to be determined by the commissioners. Nothing done by the commissioners to change the route under this section would be binding on commissioners appointed to determine the place and manner of crossing another railroad. *Matter of New York, Lake Erie, etc., R. R. Co.*, 7 State Rep. 791.

Notice of Application for Change of Route.

SUPREME COURT.

In the Matter of the Petition of Frederick O. Norton

agst.

The Wallkill Valley Railway Company and others.

To the WALLKILL VALLEY RAILWAY COMPANY, GARTON KEATOR, GEORGE COUTANT and JAMES ELTINGE:

You are hereby notified that a petition, survey, map and profile, copies of which are hereto annexed, will be presented to the Hon. W. L. Learned, at his chambers, in the city of Albany, on the 21st day of September, instant, at eleven o'clock in the forenoon of that day, of which petition and papers a copy is herewith served upon you; and an application will then and there be made to said justice, based upon said petition and papers, for the appointment of three disinterested persons, under the General Railroad Act and the acts amendatory thereof, to examine the route over the lands of the undersigned more particularly mentioned and stated in said petition proposed by the said company for their railway, and also the route to which it is proposed by the undersigned to alter the same, and to make determination thereupon in accordance with the said acts. Yours, etc.,

Dated September 8, 1885.

F. O. NORTON.

Petition for Change of Route.

SUPREME COURT.

In the Matter of the Petition of Frederick O. Norton

agst.

The Wallkill Valley Railway Company, George Coutant, James Eltinge and Garton Keator.

To the Hon. WILLIAM L. LEARNED, one of the Justices of the Supreme Court:

The petition of Frederick O. Norton respectfully shows that he is the owner of certain pieces or lots of land situate in the town of Rosendale, in the county of Ulster and State of New York.

That on or about the 1st day of September, 1885, there was served upon this deponent, by the Wallkill Valley Railway Company, a written notice of the time and place where the map and profile was filed designating the route of its road. That such route as designated and laid out passes over the lands of your petitioner, described as follows:

All those certain strips or parcels of land situate in the town of Rosendale, county of Ulster and State of New York, and lying on both sides of the center line of the Wallkill Valley railway, as said center line is now located on the map and profile filed in the county

clerk's office of said county. Said strips or parcels of land being bounded and described as follows:

First.—A strip extending from between the boundary lines of George Coutant and F. O. Norton on the south to the boundary line between lands of F. O. Norton and Garton Keator on the highway leading from Rosendale to the Lucas turnpike, on the north; said strip being one thousand three hundred and fifty feet in length on said center line, and to embrace all lands of said F. O. Norton lying within thirty-three feet of the said center line of railway.

Second.—A strip or parcel extending from the boundary line between Garton Keator and said F. O. Norton, at the highway aforesaid, on the south, to the boundary line between F. O. Norton and the Lawrence Cement Company on the north, being one thousand and thirteen feet in length on said center line, and thirty-three feet in width on each side of said center line.

Said strips or parcels being divided in two parcels by lands of Garton Keator intervening.

Your petition further shows that the map hereto annexed marked "A" is a true copy of the map and profile filed by the said railway company as alleged in their said petition, except that it is reduced in size and contains a delineation of the proposed alteration hereinafter referred to. That the red line on said map shows the location of the railway over deponent's land, as proposed by the said company, and the blue line upon said map shows the alteration of route proposed by your petitioner.

And your petitioner further shows that he feels aggrieved by the location proposed by said railway over the strip firstly prescribed by them, one thousand three hundred and fifty feet in length, and that the following are the petitioner's objections to such route and location:

That the said strip or location, after leaving the intersection of petitioner's and said Coutant's land as described in said railway petition, crosses the highway on to this petitioner's land, to the easterly of said highway, and thereafter keeps upon the petitioner's said land along or near to and nearly parallel with the said highway northerly until it crosses the road leading to Lucas turnpike near the intersection thereof to said highway, and then again crosses the said highway to the west side thereof on to Garton Keator's land, thereby requiring a subsequent recrossing of the said highway a little further north.

That the said location from the point where it first crosses to where it crosses the road above mentioned runs between the highway and a cliff or ledge of cement rock running nearly parallel therewith. That said cliff or ledge of cement rock faces toward the said road and is cut off from access to the said road by the said proposed line. That such cliff or ledge of hydraulic cement rock belonging to this petitioner is the outcrop of large deposits thereof extending under the said proposed location to the said highway. That your petitioner's business is the manufacture and sale from said hydraulic cement rock in Rosendale, of hydraulic cement. That from its proximity to the highway and the facility in blasting out the same, the said ledge or outcrop, as well as that rock lying under the surface and under the location of said railroad, is peculiarly valuable and of very great value to this petitioner.

That at the south end thereof, the said ledge runs up to the high-

way, and is crossed or covered by the said strip or location, and as it proceeds north, diverges from the said highway upon an average distance of about one hundred and fifty feet. That if the said railway company are permitted to locate their railroad upon the proposed strip it will very greatly and injuriously affect the value of your petitioner's said cement property, not only as to the part thereof actually occupied by the said strip or location, but also as to the ledge itself and the contiguous rock owned by your petitioner. That the operation of said railway upon said location will make it extremely difficult and almost impossible to blast or quarry said cement rock on said ledge, and compel him to take such precautions and use such measures, as to charges and blasts, as substantially to cripple and prevent the working of said quarry; and also to greatly embarrass the removal of cement rock when quarried from the premises of your petitioner.

Your petitioner further says that the said location is needless and even injurious to said railway company, in this: that it needlessly and injuriously to your petitioner, and to the public, makes a double curve in the railroad at this point, crosses a much-frequented highway three times within a distance of a few hundred feet; when, by not crossing on the east side of said highway, but by keeping along the west side thereof, as shown by the blue line on the map hereto annexed, such curves, repeated crossings, great injury to the deponent would be wholly avoided, without any damage or increase of expense, length of route or substantial alteration thereof.

And your petitioner, in accordance with the statute in such case made and provided, hereby asks that the said route or location be altered; and that commissioners be appointed for the purpose of considering the propriety of such alteration; and to examine the route proposed by the company, and the route of alteration proposed by your petitioner, and to determine in regard thereto.

The following is the route proposed by your petitioner: Commencing at a point about three hundred feet north of the four corners of the road as shown on the map hereto annexed, keeping thence southwesterly on the west side of said Rosendale highway, and substantially parallel therewith, as shown by the blue line on the map, until it meets the line as proposed by the company, on George Coutant's land, west of the road, being an alteration of about one thousand seven hundred feet in length, and making a deviation at the widest point between the two proposed lines, of not over one hundred feet.

The profile of the proposed alteration, both as to cutting and filling, being substantially the same as that proposed by the railway; the same being a shorter and straighter line.

Your petitioner further shows that the map and profile hereto annexed indicate the route of both proposed lines and the profile thereof; and the paper marked "B," hereto annexed, is a survey of the proposed alteration.

Your petitioner, the owner of the land affected, George Coutant, James Eltinge and Garton Keator are the only owners affected by the proposed alteration.

That, as your petitioner is informed and believes, the original route surveyed by the said railway company is, at this point, identical with the alteration proposed; that the said railway company's officers had, before the presenting of their petition, promised your petitioner to

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construct their railroad on the line of the proposed alteration, substantially, in consideration of which your petitioner promised to give them the right of way over the strip secondly described in said petition, notwithstanding said strip covers valuable cement lands; and the said railway company have, without further agreement or permission on the part of your petitioner, already entered upon and substantially completed the grading of their road on said second strip, without any compensation to your petitioner.

Wherefore, your petitioner prays that three disinterested persons, one of whom shall be a civil engineer, be appointed by your honor, commissioners to examine the route proposed by the company, and the route to which it is proposed to alter the same; and to adopt the proposed alteration, if deemed consistent with the rights of all the parties and the public.

Dated *September 8, 1885.*

F. O. NORTON.

CITY AND COUNTY OF ALBANY, ss.:

Frederick O. Norton, being duly sworn, says that he is the petitioner above named, and has heard the above petition read and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

F. O. NORTON.

Sworn before me, Sep- }
tember 8, 1885. }

GEORGE M. WILLIAMS,
Commissioner of Deeds.

" B. "

The deviation proposed by Mr. Norton leaves the line proposed by the railroad company at a point about three hundred feet north of the four corners of the road as shown on the map, and keeps thence south-westerly, keeping west of the road, and substantially parallel therewith, as shown by the blue line on the map, until it meets the line proposed by the company, on George Coutant's land west of the road — being one thousand seven hundred feet in length, more or less.

Order.

SUPREME COURT.

In the Matter of the Petition of Fred-
erick O. Norton

agst.

The Wallkill Valley Railway Company,
George Coutant and James Eltinge.

The application noticed by the petitioner above named, to be made before me on the 21st day of September last, having been adjourned to the 6th day of October, 1885, on reading and filing the petition of F. O. Norton, verified the 8th of September, 1885, and notice of motion therewith, the affidavit of Levi D. Bruyn, verified the 26th day of September, 1885; of Simon Schoonmaker, verified the 2d day

of October, 1885, and of F. O. Norton, the 6th day of October, 1885, and of George S. Coutant and James B. Eltinge. and on motion of Mr. Hand, for the said petitioner, Mr. R. Bernard appearing for the defendant, the Wallkill Valley Railway, and Mr. A. Schoonmaker, Jr., for the defendants Coutant and Eltinge; and t appearing to me that sufficient cause therefor exists, it is

Ordered that Abraham B. Cox, Jr., a practical engineer of the city of Albany, Charles H. Clearwater, of Rosendale, and James G. Lindsley, of Rondout, three disinterested persons, be, and the same are hereby appointed commissioners under the General Railroad Act, and the acts amendatory thereof, to examine the route over the land of F. O. Norton, the petitioner above named, more particularly mentioned and stated in the said petition proposed by the said company for their railway, and also the route to which it is proposed by the said Norton to alter the same, and to make determination thereupon in accordance with the statute.

Dated *October 30*, 1885.

W. L. LEARNED,

JOHN McEWEN, *Clerk.*

Justice Supreme Court.

Oath of Commissioners.

(Title as above.)

ULSTER COUNTY, ss..

We, the commissioners duly appointed by an order of the Hon. W. L. Learned, Supreme Court judge, commissioners to examine the proposed routes of the petitioner and the railroad company, in the above-entitled proceeding, do solemnly swear that we will faithfully perform the duties as such commissioners and of said office, to the best of our understanding and ability, and each of us, for himself, so swears.

Sworn this 10th day of Novem- }
ber, 1885, before }

CHAS. H. CLEARWATER,

JAS. G. LINDSLEY,

A. B. COX, JR.,

D. E. KEYSER,

Commissioners.

Notary Public in and for Ulster Co.

(Title as above.)

We, the undersigned, designated and appointed by the Hon. Wm. L. Learned, a justice of the Supreme Court, commissioners to examine the route proposed by the company, and the route to which by the petition of Frederick O. Norton it is proposed to alter the same, after hearing the parties and hearing testimony on both sides, do adopt the alteration proposed by and in the petition of said Frederick O. Norton, and the map and survey attached hereto, all of which are thereto annexed. And we do hereby determine that the said railroad shall be, and hereby is located on the route proposed in the said petition.

Dated KINGSTON, N. Y., *December 16*, 1885.

JAMES G. LINDSLEY,

C. H. CLEARWATER,

A. B. COX, JR.,

Commissioners.

We do hereby certify that the within is the determination by us

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made in the within proceeding, and that the same was duly made and signed by us, and each of us, at the day of its date.

JAMES G. LINDSLEY,
C. H. CLEARWATER,
A. B. COX, JR.,
Commissioners.

(*Title as above.*)

To Messrs. HALE & BULKLEY, Attorneys for F. O. Norton, and J. D. WURTS, County Clerk of Ulster County.

GENTS — Please take notice that the defendant, the Wallkill Valley Railway Company, hereby appeal to the General Term of this court, from the decision and determination of the commissioners in the above-entitled proceeding, in and by which determination the said commissioners adopted the alteration in the line of the said railway as proposed by the said Frederick O. Norton in his petition in this proceeding, such determination and the papers accompanying the same having been filed in the office of the clerk of Ulster county on the 19th day of December, 1885.

Dated January 6, 1886.

Yours, etc.,

R. BERNARD,

Att'y for the Wallkill V. R. W. Co., Kingston, N. Y.

On appeal to the Court of Appeals to review decision of commissioners appointed to change route only questions of law can be considered or determined, and all that can be done by the General Term, or by the Court of Appeals, is to send the report back where errors of law have been committed. *Matter of Lake Shore, etc., R. R. Co.*, 89 N. Y. 442. An appeal by an aggrieved land-owner, in proceedings to procure a change of route, does not lie to the Court of Appeals to review questions of fact passed upon by the commissioners after hearing testimony and viewing the premises, and it is even questioned whether such an order is, in any case, reviewable in that court. *Matter of New York, Lake Erie, etc., R. R. Co.*, 99 N. Y. 388.

§ 13. *How title to real estate is acquired.* — In case any company, formed under this act, is unable to agree for the purchase of any real estate required for the purpose of its incorporation it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act.

LAWS OF 1854, CHAPTER 282.

§ 4. *Acquiring real estate, not to apply to certain real estate in Buffalo.* — In case any railroad company, the line or route of whose road has been surveyed and designated, and the certificate thereof duly filed, as required by law, is unable to agree for the purchase of any real estate required for its roadway or other purposes, the said corporation shall have the right to acquire title to the same by the special proceedings prescribed in the act hereby amended; and all real estate acquired by any railroad corporation under and pursuant to the provisions of this act, for the objects and purposes herein expressed, shall be deemed to be acquired for public use. But this section shall not be so construed as to apply to any real

estate in the city of Buffalo situated between Main and Michigan streets, except that lying between Exchange street and Buffalo river.

Statutes delegating the right of eminent domain to railroad and other corporations for public use being in derogation of common-law rights, are not to be extended by implication, and must be strictly complied with. Yet they are not to be construed so literally as to defeat the evident purposes of the legislature. The powers granted will extend no further than is expressly stated in the act, or than is necessary to accomplish its general scope and purpose. If there remain a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt will be solved adversely to the claim of power. Passenger depots, convenient and proper places for the storing and keeping of cars and locomotives; proper, secure and convenient places for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge, and before delivery, are the acknowledged necessities for the running and operating of a railroad and the right to take lands for those purposes is included in the grant of power given by the General Railroad Act, which authorizes a railroad corporation to acquire real estate "for the purposes of its incorporation or for the purpose of running or operating" its road. It is no objection to proceedings under the act that there are other lands in the same vicinity equally well adapted for the purposes which possibly might be acquired by purchase. The location of the buildings and structures of the company is within the discretion of its managers, and courts will not supervise it ordinarily. A usufructuary right, either temporary as to its continuance or limited as to its character, does not give to the company the property which it has a right under the statute to acquire. And whenever the proper running and operating its road and the interests of the public require permanent structures, it is no objection to a proceeding to acquire the land in fee that the company is a lessee of the premises for a term of years. *Matter of the New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546. The only limit to the power granted to railroad corporations to take lands for railroad purposes is the reasonable necessity of the corporation in the discharge of its duty to the public. This includes the acquisition of lands for depots and buildings convenient and proper for the storage and keeping of cars and locomotives when not in use, and for the receipt, storage, safe-keeping and delivery of freight and property as well as such facilities as are usually required in

operating its road and the successful prosecution of its business. When the necessity exists and a reasonable discretion is exercised, the courts will not interfere. In determining the necessity, the prospective needs of the corporation within a reasonable time may be taken into consideration. When a case is brought within the legitimate exercise of this power, the consideration that such exercise will be attended with extreme inconvenience and hardship to individuals is not entitled to any weight; where a clear right to the exercise of the power is shown, it is the duty of the courts to authorize it. The rule, however, that corporations deriving power from the legislature to take property under the right of eminent domain cannot exercise such power in reference to property already dedicated to public use, does not prohibit the acquisition of a right to use streets and avenues and piers at the end thereof, included within land sought to be condemned for railroad purposes. The rights in the waters of the port of New York reserved to the public by the acts of the legislature, granting lands under water to the city of New York, are not invaded by the appropriation of the land for such railroad purposes. *Matter of New York Central & Hudson River R. R.*, 77 N. Y. 248. Railroad companies are not to be allowed to appropriate lands under the statute not wanted for present use, but only desired in view of prospective and conjectural increase in business; nor lands for building tenements for their servants, or wharves unless they are shown to be necessary for corporate purposes. Clear authority of law must be shown for taking private property. The court is to determine the necessity and extent of appropriation of land by a railroad company under the General Railroad Act. *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137. Where the company has immediate need of property for a passenger depot, the opinion of the officers as to its size and location are entitled to great weight unless it appear that, under pretense of the necessities of the company, it is seeking to injure others. *N. Y., West Shore & B. R. R. Co. v. Townsend*, 17 Week. Dig. 469. Where lands have been lawfully appropriated by a railroad company for depot purposes under the right of eminent domain, express legislation is necessary to justify their appropriation by proceedings *in invitum* to a different public purpose. Where lands were condemned for depot purposes, it was held that the erection thereon of decorations and conveniences for passengers, such as restaurants and music stands, was not such an abandonment of the uses for which the lands were acquired as to produce a forfeiture. *Prospect Park & C. I. R. R.*

Co. v. Williamson, 91 N. Y. 552; reversing 24 Hun, 216; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574. The title to lands under water may be acquired by a railroad company without notice to the owner of the adjoining upland. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 269; citing *Gould v. H. R. R. Co.*, 6 N. Y. 522.

It is said that a railroad corporation may acquire title to lands under water where parties having a grant have failed to fulfill conditions imposed. *Matter of N. Y., West Shore & Buffalo R. R. Co.*, 27 Hun, 57; reversed, 89 N. Y. 453, on authority of 77 id. 248, which is there approved. Where land is required for the legitimate purposes of a railroad in respect to its public use, it is subject to condemnation for such purposes under the General Railroad Act, although the route of the proposed road may not pass directly over it. *New York, Lackawanna, etc., R. R. Co. v. Scheu*, 33 Hun, 148; affirmed without opinion, 98 N. Y. 664. But under the statute a company cannot acquire title to real estate without the owner's consent, simply for the purpose of removing gravel therefrom, to be used in constructing a distant part of the road. *Matter of N. Y. & Canada R. R. Co. v. Gunnison*, 1 Hun, 496. See § 21. A railroad company is not disqualified to take proceedings to condemn land for its benefit by the fact that it has been leased to another company, nor is the rule altered by the fact that the lessee is a foreign corporation. *N. Y., Lackawanna, etc., R. R. Co. v. Union Steamboat Co.*, 99 N. Y. 12; affirming 35 Hun, 220.

Before a proposed railroad can be built, its builders must obtain the right of way; they cannot take private property for that purpose without first making compensation therefor; and if they do, they become trespassers. *Uline v. N. Y. C. R. R. Co.*, 101 N. Y. 98. The legal existence of a corporation authorized to construct a railroad is the foundation of the right to take property for its use under the right of eminent domain. *Matter of Kings Co. Elevated R. R.*, 1 State Rep. 512. The provision of the General Railroad Act to divest owners of title to property without their consent must be strictly construed. *Adams v. Saratoga & Washington R. R. Co.*, 10 N. Y. 328; citing *Sharp v. Spier*, 4 Hill, 76; *Stryker v. Kelly*, 2 Denio, 323.

§ 14. *By petition to Supreme Court; allegations necessary; copy petition, upon whom served.*—For the purpose of acquiring such title, the said company may present a petition praying for the appointment of commissioners of appraisal to

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the Supreme Court, at any General Term or Special Term thereof, to be held in the district in which the real estate described in the petition is situated. Such petition shall be signed and verified according to the rules and practice of such court. It must contain a description of the real estate which the company seeks to acquire; and it must in effect state that the company is duly incorporated, and that it is the intention of the company in good faith to construct and finish a railroad from, and to the places named for that purpose in its articles of association; that the whole capital stock of the company has been in good faith subscribed as required by this act; that the company has surveyed the line or route of its proposed road and made a map or survey thereof by which such route or line is designated, and that they have located their said road according to such survey, and filed certificates of such location, signed by the majority of the directors of the company, in the clerk's office of the several counties, through or into which the said road is to be constructed; that the land described in the petition is required for the purpose of constructing or operating the proposed road; and that the company has not been able to acquire title thereto, and the reason of such inability.

The petition must also state the names and places of residence of the parties so far as the same can by reasonable diligence be ascertained, who own, or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind, or are unknown, that fact must be stated, together with such other allegations and statements of liens or incumbrances on said real estate as the company may see fit to make.

A copy of such petition, with a notice of the time and place the same will be presented to the Supreme Court, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the presentation of the same to the said court.

Seven subdivisions of this section regulate the method of service of notice of application.

LAWS OF 1876, CHAPTER 198.

§ 2. *Notice when the land required forms part of street.* — Whenever any land, required by a railroad company for the purposes of its road, is contained in and forms a part of any street or avenue in any city or village in which the owners of adjoining lands on the line of such street or avenue claim a right of property or the fee thereof, in such case the notice to be given of the application for the appointment of commissioners under the special proceedings under the act to acquire title to such land, as well as the notice of hearing before such commissioners, shall be served by the publication of the said notice twice each week for three weeks in at least two newspapers published in the county in which such city or village is located, to be designated by the court to which the said application is to be made.

Section 14 gives the substance, and to some extent the form of the petition for the appointment of commissioners of appraisal, and the allegations which it must contain. *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145.

The petition. — The court only has jurisdiction when the applicant cannot acquire title by purchase, or with the assent of the

owner. The law is zealous of the rights of property, and will not permit them to be invaded under the right or color of eminent domain except upon necessity, and when title cannot be obtained by purchase and with the consent of the owner. The reasons of the inability must be stated, that the court may determine their sufficiency, and also that the owner of the land may negative or disprove them, as the reasons why agreement cannot be had may be various, and a petition which fails to state the reasons for disagreement is defective. *Matter of Marsh*, 71 N. Y. 316; citing *N. Y. & B. R. R. Co. v. Goodwin*, 12 Abb. (N. S.) 21; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *Matter of Prospect Park v. Coney Island R. R. Co.*, 67 N. Y. 371. The petition must show such a description of the land sought to be condemned as will show its location and the boundaries thereof. A defective description cannot be remedied by reference to a description in a deed. In proceedings of this character extreme accuracy is essential for the protection of the rights of all the parties, and a failure to comply with the statute must lead to difficulty and embarrassment. *Matter of N. Y. C. & H. R. R. Co.*, 70 N. Y. 192. See *Matter of N. Y. C. R. R. Co.*, 20 Barb. 419. A petition under a special statute, Laws of 1875, chapter 686, with same clause as to failure to agree, was held sufficient where it stated that the petitioner has not been able to acquire title to said land, and that the reason of such inability is that the owner refuses to sell the same for any reasonable compensation, and that your petitioner has not been able to agree with the owner or owners of said real estate, or of any interest therein, for the sale of the same to your petitioner. It seems that a defect in the petition may be cured by proof presented upon the hearing. *Matter of Suburban Rapid Transit Co.*, 38 Hun, 553. In *Matter of N. Y. Cable R. R. Co.*, 36 Hun, 356, a statement there made as to failure to agree was held insufficient under the statute under which the application was made, following *Matter of Broadway Underground Ry. Co.*, 23 Hun, 693. See *Matter of One Hundred and Thirty-eighth Street*, 60 How. 290; *Matter of Suburban Transit Co.*, 16 Abb. N. C. 152. It is held in the latter case that the defect is amendable, and that where such a general allegation is put in issue by the opposing affidavits the court may receive from the petitioner affidavits of the facts in support of the allegations as proofs under the issue. It is held in *Matter of Metropolitan Ry. Co.*, 14 Week. Dig. 520, that proceedings to acquire lands for the use of a railroad company may be maintained if the proof estab-

lishes the truth of the allegations of the petition that the owner refused to sell for any reasonable consideration to a reasonable degree of certainty. It is not necessary that in the negotiations for purchase with the owner the specific boundaries should have been given, as in the petition; it is sufficient if the owner understands what property the company desires to obtain. But in *Matter of N. Y. Central, etc., R. R. Co.*, 15 Week. Dig. 201, it is held that a description of the lands sought to be acquired in the petition which designates the east and west lines thereof as being those described in the deed to the present owners, and the south line to be at a specific distance from the south line of petitioner's land, was not sufficient. Stating that the price asked for the land is excessive is a sufficient statement of the reason of inability to acquire title. The petition may ask both for lands for the route and lands for building, and without giving separate descriptions. A statement that the company is a corporation, duly organized under and in pursuance of the laws of the State of New York and New Jersey, for the purpose of constructing its line of the road, and then stating how and under what law it is organized, is sufficient. The petition must state that the land is required for the purpose of constructing or operating the proposed road. *Matter of N. Y., West Shore & B. R. R. Co.*, 64 How. 216. The same case holds that an objection to the sufficiency of the petition may be raised and disposed of before trying the issues.

One who has, or claims to have, an interest in the lands sought to be acquired, if not named in the petition, has a right to be made a party to the proceedings on timely application to the court supported by affidavits, which, if true, show him to be a party in interest; the allegations in the affidavit must be tried by legal evidence and not by counter affidavit, and the court has no right to impose a condition upon an applicant who makes out a *prima facie* case. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 26 Hun, 194. After an order has been made and appealed from the petition cannot be amended; proceedings are under a statute and must be strictly followed. *Matter of N. Y., West Shore & B. R. R. Co.*, 89 N. Y. 453; reversing 27 Hun, 57. Under a petition to ascertain what compensation should be paid, all parties having an interest in a street through which the railroad is to pass have a right to be heard. An application to amend the petition should be made at the Special not at the General Term. *Matter of Metropolitan Transit Co.*, 7 State Rep. 477. An objection is not well taken that a petition fails to show

\$10,000 per mile of the proposed road has been subscribed, and ten per cent paid in. Section 6, chapter 560, Laws 1871, only shows \$6,000 per mile need be subscribed and ten per cent paid in where the road is a narrow-gauge road. *Matter of Sheepshead Bay, etc., R. R. Co.*, 5 Week. Dig. 488. The provisions of section 26 do not require proceedings to be taken thereunder for the acquisition of lands, but petition may be made for appraisal at the option of the company. *Matter of N. Y. Bridge Co.*, 67 Barb. 295. Where a railroad company requires additional land, it is not necessary, in the new petition, to embody the allegations of the former one, or that the map required by the General Act should be filed. *N. Y. Central R. R. Co. v. Sweeney*, 4 Hun, 381; *N. Y. Central R. R. Co. v. Pierce*, 33 id. 274. A compulsory reference cannot be ordered to take proof upon a petition to acquire lands for railroad purposes. *Matter of Sheepshead Bay, etc., R. R. Co.*, 5 Week. Dig. 488. Within the meaning of the General Act, section 14, and the requirements of the Code of Civil Procedure, section 525, a general agent for the purchase of lands for obtaining right of way for a railroad corporation is an officer having authority to verify petitions in proceedings to acquire title to lands. *Lackawanna, etc., R. R. Co. v. Scheu*, 33 Hun, 148. Inability to procure the assent of the landholders is the only prerequisite under the statute to the appointment of commissioners. An application for the appointment of commissioners should not be denied because other companies having coincident routes have refused their consent to the construction and operation of the road of petitioner as required by section 14. *Matter of Thirty-fourth Street R. R. Co.*, 102 N. Y. 343. In proceedings upon petition by a railroad company to take a designated piece of upland along the river bank, the objection that the petitioner intends to build an embankment across a bay cutting off a dock from the river is not presented. The remedy is at law or in equity. *Matter of N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 685. It is held in *Matter of Boston, H. T. & W. R. R. Co.*, 10 Abb. N. C. 104, and *New York & Albany R. R. Co. v. N. Y., W. S. & B. R. R. Co.*, 11 id. 386, that a map which indicates only a single line is insufficient. A railroad company may petition for the appraisement of the surface only of the land required for its road. *Ex parte Hartford & Conn. W. R. R. Co.*, 65 How. 133.

Notice of filing.—The map and profile required by section 22 must have been served as therein required before commissioners can be appointed. *Wallkill Valley R. R. Co. v. Norton*, 12 Abb. (N. S.) 317.

Notice of hearing.—The notice should be given to afford an opportunity to raise questions as to the regularity of the proceedings, as that the petition was not properly verified, or that it does not appear there was a failure to agree with the owner, since it is too late to raise these objections on confirmation of the report. *N. Y. & Erie Ry. Co. v. Corey*, 5 How. 177. If the petition does not show the facts required by statute to be stated, the objection may be disposed of before trial. *Matter of N. Y., W. S. & B. R. R. Co.*, 64 How. 217. Parties having liens upon the lands should have notice of the proceedings. *Watson v. N. Y. C. R. R. Co.*, 6 Abb. (N. S.) 91. See 47 N. Y. 157, *supra*, referring to another statute.

An allegation that only reasonable notice was given was held bad in an action for trespass. *Cruger v. H. R. R. R. Co.*, 12 N. Y. 190. And it is held by same authority that where a notice of appraisal is defective, nothing short of an appearance by the party whose lands are sought to be taken, and actual litigation on the merits ought to be regarded as an implied waiver of the defect. The provisions of Laws 1870, chapter 198, for publication of notice of appraisal, apply only where the owners of the adjoining lands on the line of street have the fee, and this right is sought to be extinguished. *Matter of N. Y. Central R. R. Co.*, 77 N. Y. 248. In any proceeding to condemn the private property of a citizen for a public use, all notices and hearings that may tend to give the party to be affected any semblance of benefit must be carefully observed. *People v. Kniskern*, 54 N. Y. 52. See Mills on Eminent Domain, § 95. In *Stewart v. Palmer*, 74 N. Y. 183, it is held in case of an assessment that it is not enough that the owner by chance have a notice, or that he may as a matter of favor, have a hearing; it is a matter of substance. *Cruger v. H. R. R. Co.*, 12 N. Y. 190. A voluntary appearance and litigation on the merits waives notice. *Dyckman v. The Mayor*, 5 N. Y. 434. Notice of time and place of filing map and profile is necessary. *Wallkill Valley R. R. Co. v. Norton*, 12 Abb. (N. S.) 317; *Matter of N. Y. & B. R. R. Co.*, 62 Barb. 85. But this is only required as to actual occupants and not to owners who are not occupants. *Lackawanna, etc., Co. v. Scheu*, 33 Hun, 148. Where the person on whom service was to be made, although a resident of the State, was at the time absent in Europe, held, that a service on a party of suitable age left in charge of the dwelling house of such person during his absence, was in conformity with the statute. *Matter of N. Y. & Oswego R. R. Co.*, 40 How. 335.

Where lands were taken under a special statute, it was held that that statute was intended to secure the attendance of some fit person before the tribunal making the appointment, as guardian or attorney to attend personally to the interests of the infant, and that without such appearance the proceedings in that case were entirely unauthorized and void, and that until such appearance jurisdiction was not acquired. *Hotchkiss v. Auburn, etc., R. R. Co.*, 36 Barb. 600. Where there is what is termed a special estate in the lands, as for life, for years, inheritance, at will, or sufferance, the petition must state those facts. Chap. 444, § 2, Laws 1857. Under the provisions of section 25 of the General Railroad Act, no notice is required to be given to owners of adjoining upland where application is made to the State authorities for lands under water, as such owner has no interest therein. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 269, citing *Gould v. H. R. R. Co.*, 6 N. Y. 552.

Precedent for Petition.

NEW YORK SUPREME COURT—COUNTY OF ULSTER.

In the Matter of the Application of The New York, West Shore and Buffalo Railway Company to Acquire Title to certain Real Estate, of which Andrew S. Lefever, Elizabeth L. Conklin and Albert Conklin, her husband, Charles Parrott, Eliza Knapp, Delia A. Lefever, are the owners or persons interested therein.

} *Petition.*

To the Supreme Court of the State of New York:

The New York, West Shore and Buffalo Railway Company, by this petition, respectfully shows to this court and alleges on information and belief:

First.—That the said New York, West Shore and Buffalo Railway Company is a corporation duly organized under and in pursuance of the laws of the States of New York and New Jersey, for the purpose of constructing, maintaining and operating a railway for public use, in the conveyance of persons and property, from a point on the Hudson river in the county of Hudson and State of New Jersey, or from a point in the said county of Hudson to a point on the State line between the States of New Jersey and New York, at or near Tappan-town in the county of Rockland in the State of New York; and thence in said State along or near the west shore of the Hudson river *via* Haverstraw, West Point, Newburgh, Rondout, Catskill, Athens and Coxsackie to or near Schenectady; and thence along or near the south shore of the Mohawk river to Utica; and thence *via* Syracuse to Buffalo, with a branch from a point on its main line near Cornwall Landing to Middletown, and with loop lines or branches to the cities of Albany and Rochester; the line of said railway being intended to

run through or into the counties of Hudson and Bergen in the State of New Jersey, and the counties of Rockland, Orange, Ulster, Greene, Albany, Schenectady, Montgomery, Herkimer, Oneida, Madison, Onondaga, Cayuga, Seneca, Ontario, Monroe, Livingston, Genesee and Erie in the State of New York.

Second.—That the said New York, West Shore and Buffalo Railway Company was organized under and in pursuance of an act of the legislature of the State of New York, entitled "An act to authorize the consolidation of certain railroad corporations," passed May 20, 1869, and under and in pursuance of the laws of the State of New Jersey, authorizing such consolidation, by the consolidation of the New York, West Shore and Buffalo Railway Company, a corporation duly organized and existing under the laws of the State of New York, and the North River Railroad Company, a corporation duly organized and existing under the laws of the States of New York and New Jersey, by a joint agreement for consolidation made between them and filed in the office of the secretary of State of the State of New York, and in the office of the secretary of State of the State of New Jersey, on the 14th day of June, 1881.

Third.—That the said North River Railroad Company was organized as aforesaid by the consolidation of the North River Railway Company, a corporation duly organized and existing under the laws of the State of New York, and the Jersey City and Albany Railway Company of the States of New York and New Jersey, a corporation duly organized and existing under the laws of the States of New York and New Jersey, by a joint agreement for consolidation made between them and filed in the office of the secretary of State of the State of New York, and in the office of the secretary of State of the State of New Jersey, on the 5th day of May, 1881.

Fourth.—That the said Jersey City and Albany Railway Company of the States of New York and New Jersey was organized as aforesaid by the consolidation of the Jersey City and Albany Railway Company, a corporation duly organized and existing under the laws of the State of New York, and the Jersey City and Albany Railway Company, a corporation duly organized and existing under the laws of the State of New Jersey, by a joint agreement for consolidation made between them and filed in the office of the secretary of State of the State of New Jersey on the 25th day of January, 1879, and in the office of the secretary of State of the State of New York, on the 28th day of January, 1879.

Fifth.—That in each case the lines of the railroad companies consolidated as aforesaid, as located by them respectively, formed one continuous and connecting line of road.

Sixth.—That more than \$10,000 for every mile of its railroad proposed to be constructed by your petitioner in the State of New York has been in good faith subscribed to its capital stock, and more than ten per cent thereof paid in, and that it is the intention of your petitioner in good faith to construct and finish a railroad from and to the places named for that purpose in the articles of association of the companies by the consolidation of which it was formed.

That prior to such consolidation each of the companies consolidated as aforesaid had surveyed the line or route of its proposed road, and made a map or survey thereof by which such route or line was designated, and had located their said road according to such survey, and that certificates of such location, signed by a majority of the directors of the respective companies by the consolidation of which your pe-

tioner was formed, were filed in the clerk's office of the several counties through or into which their said roads were to be constructed.

Seventh.— That the said New York, West Shore and Buffalo Railway Company, one of the companies by the consolidation of which your petitioner was formed, made a map and profile of the route intended to be adopted by such company in the county of Ulster, in the State of New York, named in its articles of association, which was certified by the president and engineer of said company, and was filed in the office of the clerk of said county of Ulster, in which the road was to be made; and that more than fifteen days prior to this application said company or your petitioner, gave written notice to all actual occupants of the land hereby sought to be acquired of the time and place such map and profile were filed, and that the route designated thereby passes over the land of such occupants. That none of the occupants or owners of said land has given notice of an application for the appointment of commissioners to examine the said route.

Eighth.— That the land and real estate described in the annexed schedule "A," and which is made part of this petition, is required for the purpose of constructing or operating the proposed road of your petitioner, and that your petitioner seeks to acquire title to the same for such purpose.

That your petitioner has not been able to acquire title to said real estate for the reason that it has been unable to agree with the owners of said lands, or with the persons interested therein or having charge or direction thereof, as to the amount of compensation to be paid for the title to said lands and the right to occupy the same for the purposes aforesaid, for the reason that the said owners demand a sum for the said premises which your petitioner deems largely in excess of the value thereof. That your petitioner has in good faith endeavored to agree with the owners or persons interested therein, or having the charge and direction of the same, as to the amount of such compensation.

SCHEDULE "A."

All that piece or parcel of land (above and below high-water mark) situate, lying and being in the town of Lloyd, Ulster county, N. Y., bounded and described as follows, viz.: Beginning at a point on the division line between the lands formerly of Mrs. Mary E. Eltinge, now belonging to and owned by the New York, West Shore and Buffalo Railway Company, and running thence northerly along and following the course of the surveyed centre line of the proposed railway route of the said railway company, designated upon and shown by the map and profile thereof, on file in the office of the clerk of Ulster county, N. Y., in the city of Kingston, and by the tracing or diagram herewith submitted, two hundred and seventy-one feet, more or less, to the lands now or formerly owned or occupied by the widow of John Thompson, deceased. Said strip of land being ninety-nine feet in width along the southerly boundary and throughout its entire length or course, and being thirty-nine feet wide on the east of said centre line and about sixty feet wide on the west of said centre line, with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

That the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or

claim to own or have, estates or interests in said real estate, are as follows, to-wit.: Andrew S. LeFever, Highland, Ulster county, N. Y.; Elizabeth L. Conklin, and Albert Conklin, her husband, Highland, Ulster county, N. Y.; Charles Parrott, Highland, Ulster county, N. Y.; Eliza Knapp, Highland, Ulster county, N. Y.; Delia A. LeFever, Highland, Ulster county, N. Y.

That in describing lines and curves, the courses of such lines, direction and degree of curvature are indicated in said schedule "A" in the manner that is done by engineers, the same terms being used and in the same sense.

Wherefore, your petitioner prays that an order may be made by this court for the appointment of three disinterested and competent freeholders, who reside in the county of Ulster where the said premises are situated, or in some adjoining county, commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken for the purposes of your petitioner as aforesaid, and particularly described in said schedule "A," and to fix by said order the time and place for the first meeting of such commissioners, and that such further or other order be made herein as may be just and agreeable to the statutes and the rules and practice of this court, in such case made and provided.

Dated October 18, 1881.

NEW YORK, WEST SHORE &
BUFFALO RAILWAY COMPANY,
By THEO. HOUSTON, *A Director.*

STATE OF NEW YORK, }
City and County of New York. }

Theodore Houston, being duly sworn, says: That he is a director of the New York, West Shore and Buffalo Railway Company, and is the agent thereof for the purpose of acquiring the real estate described in the schedule annexed to the foregoing petition; that he knows the contents of said petition, and that said petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me, this 18th }
day of October, 1881. }

THEO. HOUSTON.

JNO. L. NISBET,

Notary Public No. 20, New York County.

Notice of Application for Appointing of Commissioners.

NEW YORK SUPREME COURT — COUNTY OF ULSTER.

In the Matter of the Application of The
New York, West Shore and Buffalo
Railway Company to acquire title to
certain real estate, of which Andrew
S. LeFevre, Elizabeth L. Conklin and
Albert Conklin, her husband, Charles
Parrott, Eliza Knapp, Delia A. Le-
Fevre, are the owners or persons in-
terested therein.

Notice

To the above-named owners and persons interested, and each of them:

Take notice, that the petition of the New York, West Shore and

Buffalo Railway Company, a copy of which is herewith served upon you, will be presented to the Supreme Court of the State of New York, at a Special Term thereof appointed to be held at the City Hall in the city of Kingston, N. Y., on the 12th day of November, 1881, at the opening of the court on that day, or so soon thereafter as counsel can be heard; and that a motion will then and there be made that the prayer of said petition be granted.

Dated KINGSTON, N. Y., October 19, 1881.

Yours, etc.,

F. L. & T. B. WESTBROOK,

39 John Street, Kingston, N. Y.

Attorneys for Petitioner.

§ 21. *Proceedings when title is defective; additional land, how acquired; water rights; right of way; acquiring by purchase condemnation; limitation; proviso in case of mortgagee or receiver.* If at any time after an attempt to acquire title by appraisal of damages, it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession; and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings; and may stay all actions or proceedings against the company on account thereof on such company paying into court a sufficient sum, or giving security as the court may direct, to pay the compensation therefor when finally ascertained; and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the company delays or omits to prosecute the same. And if, at any time after the construction of any railroad operated by steam by any company now existing or that may hereafter be created, such company, or any company owning, operating or leasing such railroad, or any mortgagee or mortgagees in possession of such road, or person or persons appointed by any court of competent authority as receiver or receivers of any such railroad, and in the possession of or operating the same, shall require, for the purposes of its construction, or for the purpose of running or operating any railroad so owned, leased or possessed as aforesaid, any real estate in addition to what has been already acquired for the purposes of such railroad, or shall require any further right to lands or the use of land for switches, turnouts or for filling any structures of, or for constructing, widening or completing therewith or thereon any embankments or the road-bed of such railroad when thereby greater safety or permanency may be secured, and such lands shall be contiguous to such railroad and reasonably accessible to the place where the same are to be used for such purpose or purposes, or for the flow of water occasioned by railroad embankments or structures now in use or hereafter rendered necessary, or for any other purpose necessary to the operation of such railroad; or any right to take and convey water from any spring, pond, creek or river to such railroad for the uses and purposes thereof, together with the right to build or lay aqueducts or pipes for the purpose of conveying such water, and to take up, relay and repair the same, or any right of way required for carrying away or diverting any waters, streams or floods from such railroad for the purpose of protecting the same, or for the purpose of preventing any embankment, excavation or structure of such railroad from injuring or damaging the property of any person or parties who may be rendered liable to injury by such embankment, excavation or structure as the same may have been constructed previous to such time or may then exist; such company, or mortgagee or mortgagees, person or persons in pos-

session as aforesaid, may acquire such additional real estate or any property or real estate which they now use or occupy, or right of way or other rights hereinbefore specified, by purchasing the same of the person or parties owning the same, or interested therein, or to be affected thereby, and by paying to such parties such damages as they may sustain by reason thereof, if the amount of such compensation or damage can be agreed upon between such company or mortgagee or mortgagees, person or persons in possession, and such owner or owners or parties interested in such additional real estate; and if such company, or mortgagee or mortgagees, person or persons in possession, shall, for any cause, be unable to agree for the purchase of such real estate or right of way or other rights, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain, or if the title to any such real estate or right of way or other rights already acquired or attempted to be acquired, shall, for any cause, prove defective or imperfect, then and in every such case such company, or mortgagee or mortgagees, person or persons in possession of and operating as aforesaid any such railroad, may proceed to acquire or perfect title to such real estate or right of way or other rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this act prescribed. Nothing in this act contained shall authorize the taking of any waters that shall at the time of such taking be commonly used for domestic, agricultural or manufacturing purposes to such an extent as to injuriously interfere with such use in the future. And nothing in this act contained shall authorize any railroad corporation to acquire any such gravel lands not contiguous to its right of way; nor shall it be lawful for any railroad company, or any company herein named, to take or acquire, other than by mutual agreement, any right or easement in or to any lands or real estate owned or occupied by any other railroad corporation, excepting the right to intersect or cross the tracks and lands owned or held for right of way by such company; such intersection and crossing to be limited to points where same can be made without appropriating or affecting any lands owned or held for depot or gravel beds. Provided that the mortgagee or mortgagees, receiver or receivers in possession of any railroad as aforesaid, before commencing proceedings to ascertain and appraise damages under the provisions of this act shall present a petition to the court under whose authority they are acting, or to any court of competent authority, for permission to commence such proceedings; which petition shall set forth that such real estate, right of way, or other rights as aforesaid, described in said petition, are necessary for the operation of said railroad or for the protection of the property in their possession; and a copy of which petition, with a notice of the time and place the same would be presented to said court, must be served on all persons whose interests are to be affected by the proceedings at least ten days prior to the presentation of the same to said court, and no proceedings to ascertain and appraise damages as aforesaid shall be taken by said mortgagee or mortgagees, receiver or receivers as aforesaid, unless they shall be duly authorized by order of said court.

The existence of a mortgage upon land which is a lien upon the same, taken and used by a railroad company for the purpose of conducting its road, is one of the defects in the title to such land contemplated by this section so as to authorize such company to proceed anew to acquire a valid title, in the same manner as if no appraisal had been previously made or any attempt to procure the title

by agreement or purchase. The company is not obliged to wait until the mortgaged premises are sold under a decree in foreclosure, but on discovering the existence of the incumbrance they may proceed immediately, and on complying with all the provisions of the act, to have the lien extinguished by them. *Matter of N. Y. C. R. R. Co.*, 20 Barb. 419. This section applies to cases where there has been an attempt to acquire title under the act, but for some reason the title acquired proves to be defective; in such case the statute undertakes to authorize an entry upon, or the retaining of the possession of the lands, if an entry has been already made. *Blodgett v. U. & B. R. R. Co.*, 64 Barb. 580. Where a railroad company obtained no title to lands as against the owner of the fee by legislative permission to build its road on a certain highway, orders made on an application by them for the appointment of commissioners to assess the value of the lands for the purpose of compensating the owners, should be sustained on the ground that it comes under the provision of the General Railroad Act permitting company to perfect a defective title. *Matter of Prospect Park & C. I. R. R. Co.*, 8 Hun, 30; S. C. affirmed, 67 N. Y. 371. See *Matter of N. Y. C. & H. R. R. Co.*, 77 id. 248, as to acquiring of property in New York city under this section. The language of this provision is said, *In re N. Y. & H. R. R. Co. v. Kip*, 46 N. Y. 546, to be very general and comprehensive. If lands are required for any of the purposes of the incorporation, or for the purpose of operating and running the road, that is, in the proper enjoyment and exercise of the performance of the public duties assumed by it, they may be taken *in invitum*.

The only limit to the power is the reasonable necessity of the corporation in the discharge of the duty to the public. It does not include the right to take lands for a manufactory for cars, nor for a mere subsidiary or extraordinary purpose. But passenger depots, convenient and proper places for storing cars, freight-houses, etc., are among the acknowledged necessities of the business. They may be regarded as indispensable to the accomplishment of the general purposes of the corporation and the design of the legislative grant. It is said, *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574, that all the cases are entirely consistent with the conclusion that the State has not delegated to railroad corporations the right to take property held in trust for public use, except to the limited extent specified in the statute, and that their right to take lands held in trust for a public park or common is not within the statutory grant.

See *Matter of N. Y. & Brighton Beach R. R. Co.*, 20 Hun, 201.

A railroad company may take additional lands, although it has two tracks in operation, whenever necessary, in consequence of the growing demands of its business. *Matter of N. Y. Central, etc., R. R. Co.*, 67 Barb. 426. Where application is made for additional land under this section by a road already constructed, it is not necessary for the petition to contain the allegations made in the original petition, or that the map required by section 22 be filed. *Matter of N. Y. Central, etc., R. R. Co. v. Sweeney*, 6 T. & C. 669.

The petition must, however, allege the purposes for which the land is taken. *Matter of N. Y. Central, etc., R. R. Co. v. Armstrong*, 5 Hun, 86.

§ 24. *Crossings and intersections; how additional land for, taken.*—Whenever the track of a railroad, constructed by a company formed under this act, shall cross a railroad, a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track, as may be found most expedient; and in case where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad, desirable with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such road, highway, turnpike or plankroad, or such new line as may be deemed requisite by the directors. Unless the land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in this act for acquiring title to real estate, and duly made by said corporation to the owners and persons interested in such lands. The same, when so taken, shall become a part of such intersecting highway, turnpike or plankroad, in such manner and by such tenure as the adjacent parts of the same highway, turnpike or plankroad, may be held for highway purposes.

The court has power to direct by *mandamus* that a highway be restored, and if additional land is any way required or is necessary for the purposes of such restoration, such land is manifestly required for the purposes of the incorporation of the company, and is necessary for the construction, maintenance and operation of the railroad. The statute gives ample power to condemn property under such circumstances. There is express sanction and authority for the exercise of the power. *People, ex rel. Green, v. D. & C. R. R. Co.*, 58 N. Y. 152. Proceedings under this section are proper to extinguish all easement in a crossing at grade, but the proceedings will not affect the right of the owner to a farm crossing. *N. Y., Lackawanna & W. R. R. Co.*, 8 State Rep. 251.

Burden of Proof on Application for Appointment of Commissioners.

If the petition does not state the facts required by the petition to be stated, an objection in that regard can be raised preliminarily in ef-

fect by way of demurrer, and should be disposed of before proceeding to the merits. If such objection is well taken, the proceeding is dismissed, unless a proper cause for amendment is shown. If such objection is overruled, then any defense to the proceeding by way of denial of facts in the petition or new matter outside, may be set up by affidavit or answer, and the issues so formed are to be tried. *Matter of N. Y., W. S. & B. R. R. Co.*, 64 How. 217. It may be shown on presenting the petition that it is not properly verified, or that it does not appear that the company has been unable to agree with the owner. *N. Y. & Erie R. R. Co. v. Corey*, 5 How. 177.

The objection that neither the petition nor the map filed in the office of the county clerk shows what extent of land was to be taken, or any thing more than a line showing the direction of the proposed railroad, should be raised on presentation of the petition. *Matter of N. Y. & Jamaica R. R. Co.*, 21 How. 434. The point may be raised that neither the petition, or map referred to in the petition, as filed in the county clerk's office, shows what extent of land is to be taken, or any thing more than a line indicating the direction of the proposed railroad. *Matter of Buffalo & S. L. R. R. Co. v. Reynolds*, 6 How. 96.

The court may appoint commissioners to appraise all the lands proposed to be taken in a county, although owned by different parties. The statute authorized a joint commission, comprehending all the land-owners included in one petition, and there is nothing in the statute to prevent several owners being included in one petition. *Troy & Rutland R. R. Co. v. Cleveland*, 6 How. 238. Where a railroad company makes application to acquire land, in addition to what is required for its roadway, and objections are made by the owner coupled with a denial of the specific allegations of the petition, respecting the purposes for which the road is required, the burden is upon the petitioner of proving the special circumstances alleged in support of the averment that it requires the land. The provision of the act authorizing the land-owner to disprove the allegations of the petition was intended to enable him to introduce proof on his part to meet that offered by the petitioner, and to disprove allegations of the petition capable of being disproved. As to the special circumstances lying within the knowledge of the petitioner, it is put to its proof if the owner show sufficient cause against the petitioner. *Matter of N. Y. Central R. R. Co.*, 66 N. Y. 407. It is, however, said in *Matter of Petition of N. Y. Bridge Company*, 4 Hun, 635, that the burden of proving by legal evidence

that the facts alleged in the petition are not true, is by this section cast upon the owner of the land, and an affidavit or answer is not sufficient for that purpose.

The legal existence of the corporation is at the foundation of its right to acquire property under the right of eminent domain ; it is a fact which it is compelled to allege in its petition, and which may be controverted. If, therefore, by non-performance of a condition of its charter, the corporation has forfeited or lost its corporate rights and powers, the fact may be averred by any one whose land or property is sought to be appropriated in answer to the application. So held on reversing order appointing commissioners of appraisal. *Matter of Brooklyn, etc., R. R. Co.*, 72 N. Y. 245. It is held that it is not competent to inquire into an alleged improper issue of stock, if it appears that valid subscriptions to the extent required by the statute have been made, and ten per cent thereon paid in cash. *Matter of Staten Island Transit Co*, 38 Hun, 381. Where the petition averred the due incorporation of petitioner, and a counter-affidavit denied any knowledge or information sufficient to form a belief, *held*, that, considered simply in an affidavit, it was not a denial of the averment, that treated as an answer, there was not such a denial as put the petitioner to proof of its incorporation ; Code, § 1776 ; that, therefore, conceding that the land-owner might, without a formal denial, disprove the fact, the burden was upon him of proving that the petitioner was not a corporation. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Union Steamboat Co.*, 99 N. Y. 12 ; affirming 35 Hun, 220. A denial of the intention of a railroad company to, in good faith, construct and finish its road, made by the owner of the property sought to be taken, raises an issue for trial before commissioners can be appointed, and puts the burden of proof upon the company. *Matter of Staten Island Rapid Transit R. R.*, 20 Week. Dig. 15.

The Commissioners. — Upon motion, one Special Term, it is said, has power to vacate the order of another and appoint new commissioners, and such order, being discretionary, is not the subject of review on appeal, and if such first order was obtained *ex parte*, and the owner, being free from all fault, was prevented from appearing at the hearing, and injustice has been done him, it is the duty of the court to open the default and afford the injured party the relief to which he may be entitled. *Matter of N. Y. & Oswego Midland R. R. Co.*, 40 How. 35. The appointment of one who was not a freeholder when the motion was made, but afterward became a freeholder, is valid.

New York, W. S. & B. R. R. Co. v. Townsend, 36 Hun, 630. Where commissioners were appointed on consent of parties, and it subsequently appeared one of them was not a freeholder, it was held that, in the absence of allegations of improper conduct on his part, the court properly denied a motion, made by one of the parties who had consented to his appointment, to have the report set aside and a new commissioner appointed. *N. Y., W. S. & B. R. R. Co.*, 335 Hun, 575. The fact that the wife of a commissioner is cousin to one of the stockholders of the railroad will not vitiate the appraisal. *Albany & N. R. R. Co. v. Cramer*, 7 How. 164. The appointment of a son of a commissioner a station agent by the company pending the proceedings is ground for setting aside an appraisal. *N. Y., W. S. & B. R. R. Co. v. Townsend*, 36 Hun, 630. Until the confirmation of the commissioners appointed to assess damages, the court may allow a discontinuance of the proceeding. *Ex parte N. Y., Syracuse & B. R. R. Co.*, 4 Hun, 311; *N. Y., W. S. & B. R. R. Co. v. Thorne*, 20 Week. Dig. 128.

Order Appointing Commissioners.

At a Special Term of the Supreme Court of the State of New York, held in and for the county of Ulster, at the City Hall, in the city of Kingston, on the 12th day of November, 1881:
Present — Hon. Theodorick R. Westbrook, *Justice*.

In the Matter of the Application of the New York, West Shore and Buffalo Railway Company to acquire title to certain real estate of which Andrew S. LeFever, Elizabeth L. Conklin and Albert Conklin, her husband, Charles Parrott, Eliza Knapp, Delia A. LeFever, are the owners or persons interested.

Order appointing commissioners.

On reading and filing the petition of the New York, West Shore and Buffalo Railway Company, with proof of due service of a copy thereof, and of notice of the time and place of presenting the same to this court, upon all persons whose interests are affected by this proceeding, and after hearing F. L. Westbrook, of counsel for the petitioner, Alton B. Parker appearing on behalf of all owners and parties interested:

On motion of F. L. and T. B. Westbrook, attorneys for the petitioner, it is ordered that Samuel Edwards, of Columbia county, N. Y., and James E. Ostrander and James G. Lindsley, of Ulster county, N. Y., three disinterested and competent freeholders, who reside in the counties of Ulster and Columbia, be, and they hereby are appointed commissioners to ascertain and appraise the compensation to be made to Andrew S. LeFever, Elizabeth L. Conklin and Albert Conklin, her husband, Charles Parrott, Eliza Knapp and Delia A.

LeFever, the owners or persons interested in the real estate proposed to be taken for the purposes of said petitioner by this proceeding, which real estate is situated in the county of Ulster, and is described as follows: (Here follows description as in petition.)

It is further ordered that the first meeting of said commissioners be held at Upright's Hotel, Highland, Ulster county, on the 8th day of December, 1881, at two o'clock, P. M.

Enter,

T. R. WESTBROOK,

Justice Supreme Court.

Procedure.—The commissioners are required "to view the premises and hear the proofs and allegations of the parties," having done this, they are required "without any unnecessary delay to determine the compensation which ought justly to be made." The order in which they shall proceed is a matter left entirely to their discretion. They have no right to omit to hear the proofs and allegations of the parties, but whether they shall hear the proof before or after viewing the premises, is for them to decide; so as to whether one party or the other shall be first heard is for them to determine, and the parties are concluded by their decision. *Albany Northern, etc., R. R. Co. v. Lansing*, 16 Barb. 68. Where objections are made by the owner, coupled with a denial of the allegations of the petition, the burden is on the petitioner of adducing proof in support of the petition. *Matter of N. Y. Central R. R. Co.*, 66 N. Y. 407. The party whose land is taken and who claims damages therefor, has the right to the opening and closing argument in the proceedings; the rule is, that the party entitled to unliquidated damages, there being no other issue, has the right to open and close. *Matter of N. Y., L. & W. R. R. Co.*, 33 Hun, 148; affirmed without opinion, 98 N. Y. 664. It is also held below that a party who has by putting in a general appearance and proceeded without objection submitted himself to the jurisdiction of the court, cannot afterward raise objection to the sufficiency of the verification to the petition. *Lackawanna, etc., R. R. Co. v. Scheu*, 33 Hun, 148.

An error in the admission of evidence is not cured by the certificate of one of the commissioners that it did not affect the report. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 1. It is the right of the land owner to produce before the commissioners, and the duty of the commissioners to hear any and all evidence which would be competent in a court of law on similar questions. *Rochester & Syracuse R. R. Co. v. Budlong*, 6 How. 467. And the owner is entitled to full opportunity to be heard. *N. Y. & Erie R. R. Co. v. Colburn*, 6 How. 223. While the commissioners are required to

view the premises as well as hear the proofs and allegations of the parties, they are to act upon their view as well as the evidence. *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169. They are, however, controlled by the established rules of evidence. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Matter of Utica & C. R. R. Co.*, 56 Barb. 456. An award made without testimony would be regular. The commissioners must decide according to their own judgment. *Rondout & Oswego R. R. Co. v. Deyo*, 5 Lana. 298; *Rondout & Oswego R. R. Co. v. Field*, 38 How. 187. The fact that, during the examination of the premises by the commissioners, one of them was for a time separated from the others, is not an irregularity for which the award will be set aside. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265.

Amount of compensation.—The compensation for damages should not be restricted to the actual value of the land taken, nor to the depreciation of the value caused by the separation of the piece from the whole, but to the difference in value of the property before and after the improvement. Mills on Eminent Domain, § 159, citing numerous authorities. Where the owner's whole tract is taken, its market value at the time of taking is the measure of compensation; where only a part of the lot is taken, it must be treated not as a separate and independent piece, but in its relation to the part not taken, the general rule of damages which covers the part taken, and the injury to the remaining land, is that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking. It seems, in proceedings by a railroad corporation to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is first, the full value of the land taken; second, a fair and adequate compensation for all the injury the owner has sustained and will sustain by the making of the railroad over his land; and for this purpose it is proper to ascertain the effect the conversion of the street into a railroad track will have upon the residue of the owner's land. *Henderson v. N. Y. Central R. R. Co.*, 78 N. Y. 423. In making appraisals of the damages sustained by a person whose property is taken for the purpose of a railroad, the true rule is to determine what will be the effect of the proposed change on the market value of the property remaining. The proper inquiry is, what is the entire property now fairly worth in the market, and what will that part

not taken be worth when the improvement is made. *The Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169.

The intention of the legislature was to confine the commissioners to an estimate of the price to be paid by the railroad company to the owner of the land proposed to be taken, regardless of the benefits which might result to him as the owner of adjoining land in consequence of the contemplated improvement. It is a proper rule for the commissioners to adopt that they will allow full compensation for the land taken, including therein the damages to the adjacent land by reason of such taking, and that they will not allow consequent and prospective damages. They are to consider how the taking, not how the use of the land will affect the residue of the owner's land, and award damages accordingly. *Albany & Northern R. R. Co. v. Lansing*, 16 Barb. 68. The office of the commissioners is to determine the compensation to be awarded to the owner of the real estate proposed to be taken; they are to decide questions of present value, and not to speculate in respect to the probable consequences of constructing and operating a railroad. *The Canandaigua & N. F. R. R. Co. v. Payne*, 16 Barb. 273. The proper inquiry is, what is the fair marketable value of the whole property, and what will be the fair marketable value of the property not taken. The difference will be the true amount of the compensation to be awarded. *Black River & M. R. R. Co. v. Barnard*, 9 Hun, 104.

For the rule when land is taken for a highway, with right to use the highway for a railroad, see *Matter of Prospect Park & C. I. R. R. Co.*, 13 Hun, 345; S. C., 16 id. 261. It is competent to show, where land is taken for a specific use, as a railroad, that the land not taken is depreciated in value by the use of the land taken, and if that depreciation consists in the imposition of expense upon the owner of such lands, what that expense will be. *Matter of Bloomfield, etc., Gas-Light Co.*, 1 T. & C. 549. When land is taken for the construction of a railroad without the consent of the owner, the compensation therefor is not limited to the depreciation of the residue of the lot from which it is taken by such separation, but the owner is entitled to recover also for any depreciation caused by the use to which it is appropriated; where only part of a lot is taken the question is, what will the whole bring in the market after the railroad is constructed, and every thing which will depreciate the value of that residue is to be taken into account. The damages to be paid are to be determined by the detriment occasioned to the

owner of the land taken, and the amount thereof should be neither increased or diminished by the fact that the land to be taken was peculiarly well situated or adapted to the uses of a railroad. *Matter of The Boston, H. T., etc., R. R. Co.*, 22 Hun, 176. If it is more exposed to fire, if access is more difficult, if its use is more inconvenient, if its value is depreciated by smoke, noise or increased danger, these are all to be considered. The question is, what is the market value of the whole without the railroad; what is the market value of the remainder with the railroad. *Matter of Utica, etc., R. R. Co.*, 56 Barb. 457. See, also, *Troy & Boston R. R. Co. v. Lee*, 13 id. 169; *Rood v. N. Y. & Erie R. R. Co.*, 18 id. 80. The same rule is also held in 1 T. & C. 549, *supra*, as to the consideration of damages to remaining land by that taken for railroad purposes, but is contrary to the rule in *Albany & Northern R. R. Co.*, 16 Barb. 68; *Troy & B. R. R. Co. v. Northern Turnpike Co.*, id. 100; *Candaigua & Niagara Falls R. R. Co. v. Payne*, id. 273; *Black River & M. R. R. Co. v. Barnard*, 9 Hun, 104; *Matter of Prospect Park & C. I. R. R. Co.*, 13 id. 345; *Matter of Union Village, etc., R. R. Co.*, 53 Barb. 457; *Matter of N. Y. Elevated R. R. Co.*, 36 Hun, 427. But see, also, as sustaining 56 Barb. 456, *supra*, *Matter of N. Y. C. & H. R. R. R. Co.*, 15 Hun, 63. The rule upon which commissioners should determine the compensation which ought justly to be made by the company to the owner is well settled by authority. The owner should be awarded the market price of the land already taken, and in addition thereto the depreciation in the market value of the lands remaining, as compared with their former market value. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 609; *Matter of N. Y., W. S. & B. R. R. Co.*, 35 id. 262.

The question "What, in your opinion, will be the effect of the proposed improvements upon the land proposed to be taken in these proceedings upon the adjoining lands?" is not admissible under the statute which provided that the commissioners shall not make any allowance or deduction on account of any real or supposed benefits which the parties interested may derive from the construction of the proposed railroad. *Matter of N. Y., W. S. & B. R. R. Co.*, 35 Hun, 261. Compensation is not to be made to one whose lands are not taken, although he suffers consequential damages by reason of the construction of the road. *Barnes v. Southside R. R. Co.*, 2 Abb. (N. S.) 415; *Arnold v. H. R. R. Co.*, 49 Barb. 108.

In case of a dwelling-house and ten acres of land adjacent and occupied in connection, separated by a turnpike, the owner of the

land was held entitled to have the damages to the whole property estimated, including that on the west side of the turnpike. The land should have been treated as a whole and the damages assessed on a whole. *N. Y., W. S. & B. R. R. Co. v. Lefever*, 27 Hun, 537. Where, however, lands consisting of blocks of land were divided by a railroad already built, it was held no damages could be recovered for injury to property upon the opposite side of the track from that taken, and the damages were held to be: First, the value of the ground taken; second, the consequential damages, if any, to that portion of the land lying on the same side of the block as that taken. *Matter of N. Y. C. & H. R. R. Co.*, 6 Hun, 149. The rule laid down by Pierce, p. 212, is that a mere formal division into lots, or even division by a highway, does not prevent the different lots being treated as an entirety where they are still used together and held for a common purpose. The owner cannot ask to have his land treated as several distinct lots for the purpose of increasing the damages, and yet ask that it shall be considered as one tract from which the railroad has taken a part for the purpose of securing damages on the whole. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 27 Hun, 151. Loss of business profits and good-will are not substantial grounds for damages, nor are they to be considered in estimating the injury caused by the taking of land. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Canandaigua & N. F. Co. v. Payne*, id. 273; *N. Y., W. S. & B. R. R. Co. v. Cosack*, 35 Hun, 633. It was held in *Matter of N. Y. Elevated Ry. Cases*, 36 Hun, 427, that the owner is not entitled to compensation for the disturbance caused by the noise and vibration, or the annoyance of ashes, dust, cinders and smoke incidental to the operation of an elevated railway any more than of a surface railway. As to the rule in such case, with respect to surface railways, the authorities collated, Pierce on Railroads, 217, sustain the doctrine that inconveniences from noise, smoke, etc., are not independent grounds of compensation, but when land is taken may be admitted in estimating depreciation of balance. See the following authorities: *Radcliffe v. Brooklyn*, 4 N. Y. 195; *Gould v. Hudson R. R. Co.*, 6 id. 535; *Bellinger v. N. Y. Central R. R. Co.*, 23 id. 42; *Selden v. D. & H. Canal Co.*, 29 id. 634; *Coster v. Albany, etc., R. R. Co.*, 43 id. 399; *Brooklyn Park Commissioners v. Armstrong*, 45 id. 234.

In estimating the damages to which a lessee of premises, part of which he uses for drying goods manufactured in the rest, is entitled for the taking of his drying ground for railroad purposes, the

commissioners should consider the injury to the property as a whole, the difference in the value of the leasehold interest before and after the land is taken; but the willingness of the lessor to lease another piece of land, suitable for drying purposes, is not admissible. *N. Y., West Shore & B. Ry. Co. v. Bell*, 28 Hun, 426. Where valuable property was rendered difficult of access from the river by taking of lands and construction of railroad, it was held, it seems, that the proper measure of damages would be the expense of restoring communication with the river, destroyed by the construction of the road. *Matter of N. Y., W. S & B. R. R. Co.*, 29 Hun, 646. It is competent to show how much other land of the same owner is injured by the use of that taken, and he may give evidence of the value of the land for any purpose for which it is adapted. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 602. See this case as to rule of damages where part of stock farm was taken holding that measure of damages would be what it would cost to construct another track. The opinions or conjectures of witnesses as to the effect the use of the railroad will produce in frightening horses on a turnpike, or as to the necessity of deviating the line of a turnpike at another place, or the cost of diversion, or that a bridge ought to be built by a railroad company at a crossing, or as to the amount of damages the turnpike company will sustain by reason of the crossing of its road, are said to be inadmissible. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100. Although the measure of damages for lands condemned for railroad purposes is not in any case the value which they will have in the hands of the corporation acquiring them for such purposes, yet where the lands have been improved, and where they have, in the hands of the owner, a special value for railroad purposes, and a franchise for their use for such purposes has been granted by the legislature, and they are held by the owner for such use, or for sale for such use, the market value of the land for the use for which it is especially adapted, becomes the measure of damages, and it is proper for the commissioners to receive and consider evidence of all improvements, the location of the track and the value of the franchise. Technical errors committed by commissioners in the admission of evidence of value or damages, will not affect the appraisal where the court cannot see that the commissioners have erred in the principles which ought to govern such appraisal. An appraisal will not be set aside as excessive unless the excess is plain and palpable on the evidence. *Matter of Lackawanna & Western R. R. Co.*, 27 Hun, 116. It is said in

Boom v. Patterson, 98 U. S. 408, that the compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future. It is said, *Matter of N. Y. Central & H. R. R. Co.*, 6 Hun, 154, that it is proper for the owner to show before the commissioners the purpose for which lots had been purchased by him, and for which they were intended to be used. See, also, *Rondout & O. R. R. Co. v. Deyo*, 5 Lans. 298. See for the principle, *In re Furman Street*, 17 Wend. 649. In *Trustees of College Point v. Dennett*, 5 T. & C. 217, it is held that upon an appraisal of a pond under a statute for supplying water, etc., that the owner was entitled to show, upon the question of value, that there was not a pond within a radius of six miles that could be made a source of supply for cities and villages. The measure of damages was not limited to its use as a mill or ice-pond, but the owner was entitled to receive its value for any use. It is said in *Furniss v. H. R. R. Co.*, 5 Sandf. 551, that all damages of every kind, naturally consequent upon the construction of a railroad, are presumptively included in the assessment. The commissioners must appraise the land at its actual value; they cannot make a reservation of easements and privileges to the owner, and when the award stated that it was based on the supposition, and made on the condition and with the understanding that the owners of the land might open a street across the railroad, it was held by the court that the appraisal was illegal, and that the inquisition should be set aside. *Hill v. M. & H. R. R. Co.*, 5 Den. 206; S. C., 7 N. Y. 152. See, however, *Ex parte Hartford & Conn. R. R. Co.*, 65 How. 133, holding that a company may petition for the appraisal of the surface only of the land required for its road. Where there is a mortgage upon the land taken and the company have erected valuable improvements thereon, *held*, on foreclosure and sale in parcels of the whole of the mortgaged premises, that the railroad company were bound to contribute to the payment of the mortgage debt if the same was not paid by the sale, in the inverse order of alienation of the other property covered by the mortgage, the full value of the piece of land taken and appropriated by them at the time of such appropriation, with interest thereon to the time of payment. *Dows v. Congdon*, 16 How. 571. Where, in pursuance of an act of the legislature, lands are taken by a municipal corporation for a public use, upon an appraisal and payment of their value to the holder of the fee, the corporation acquires an absolute

right to them, divested of any inchoate right of dower existing in the wife. *Moore v. The Mayor of New York*, 8 N. Y. 110. The commissioners should determine the compensation to be made to a widow who has dower or life estate in lands taken, *Matter of William Street*, 19 Wend. 678, and also the compensation to be made to the mortgagee. *Matter of John Street*, id. 659. Where land is condemned for railroad purposes, a claim to a portion of the sum awarded as compensation made by the county for unpaid taxes upon the property cannot be maintained on any ground which would be insufficient in a direct proceeding by virtue of the assessment, to support a sale of the property or uphold a tax title. *Matter of N. Y. Central & H. R. R. Co.*, 90 N. Y. 342; modifying, 15 Week. Dig. 137. Change of ownership, pending proceedings, shall not affect the award, but it is to be made and perfected as if no conveyance had been made. Laws 1854, chap. 282, § 6. Where a tenant is in possession the criterion of his damages is the amount by which the rental value of the land exceeds the rent reserved. *Matter of City of Buffalo*, 1 Shel. 408 (Buffalo Super.).

The report of the commissioners.—Although the majority of the commissioners must sign the report, they need not all be together at the signing, as it involves no deliberation or judicial action. *Rochester, etc., R. R. Co. v. Beckwith*, 10 How. 168. The testimony taken on the hearing and annexed to the report is to be considered a part thereof. *Rondout & O. R. R. Co. v. Deyo*, 5 Lans. 298. Errors occurring in the report of testimony taken before the commissioners appointed to assess damages under the General Railroad Act are subject to correction by such commissioners, as a proper judicial function, and within their province only. *N. Y., W. S., etc., R. R. Co. v. Judson*, 33 Hun, 293. In case commissioners to assess damages to lands taken for highway purposes have filed their report, their power of amendment is gone, and a subsequent report has no validity. *People, ex rel. Mann, v. Mott*, 60 N. Y. 649. Upon application and order of the court, the commissioners may amend or correct their report so as to conform it to the state of facts as they exist. They have no right, however, at the time of such correction, to hear proof by claimants as to damages. After having viewed the premises, and decided upon the amount of damages to be paid, their powers, under the appointment, are exhausted, so far as the amount of damages are concerned, without further order of the court. *N. Y. & Erie R. R. Co. v. Corey*, 5 How. 177. Where there has been a succession of appraisals in the

same county, one report may embrace all the different parcels.
Troy & Rutland R. R. Co. v. Cleveland, 6 How. 238.

Report of Commissioners.

(Title as in petition or notice.)

To the Supreme Court of the State of New York:

The undersigned commissioners appointed by an order of this court, made at a Special Term thereof held at the City Hall, in the city of Kingston, on the 12th day of November, 1881, to ascertain and appraise the compensation to be made to Andrew S. LeFevre, Elizabeth L. Conklin, Albert Conklin, her husband, Charles Parrott and Eliza Knapp, owners or persons interested in the real estate proposed to be taken by the New York, West Shore and Buffalo Railway Company, for the purposes of its incorporation, do respectfully report:

That we met at the hotel of John J. Upright, in the village of Highland, Ulster county, on the 8th day of December, 1881, at ten o'clock in the forenoon, that being the time and place designated in the said order, having first severally taken and subscribed the oath prescribed by the Constitution and statutes of the State of New York, proceeded to view the premises described in the petition, and in and by the amended description hereinafter set forth, and to hear the proofs and allegations of the parties.

That the real estate proposed to be taken by the said the New York, West Shore and Buffalo Railway Company is described in the petition, served and filed, and the order appointing commissioners, made November 12, 1881, as follows: (Here insert description.) A map of the said premises is also hereto annexed.

That after viewing the premises, hearing the proofs and allegations of the parties, and the argument of counsel, F. L. Westbrook and J. Newton Fiero, Esqs., appearing for the petitioners, and Alton B. Parker, Esq., for the owners of the property, the testimony being closed, we did, without any unnecessary delay, and before proceeding to the examination of any other claim, ascertain and determine that the compensation which ought justly to be made by the said the New York, West Shore and Buffalo Railway Company to the said Andrew S. LeFevre and Elizabeth L. Conklin, owners of the premises and real estate aforesaid, was the sum of \$15,000, and that no other person is entitled to compensation in this proceeding for the lands taken.

That the minutes of the testimony taken by us in respect to said claims is hereto annexed, and marked "A," all of which is respectfully submitted.

Dated *January 2*, 1882.

SAMUEL EDWARDS,
 J. E. OSTRANDER,
 JAS. G. LINDSLEY,
Commissioners.

§ 17. *On report made, company to give notice; report, how confirmed.* On such report being made by said commissioners the company shall give notice to the parties or their attorneys to be affected by the proceedings, according to the rules and practice of said court, at a General or Special Term thereof, for the confirmation of such report; and the court shall thereupon confirm such report, and shall make an order containing a recital of the substance of the proceedings in

the matter of the appraisal, and a description of the real estate appraised for which compensation is to be made; and shall also direct to whom the money is to be paid, or in what bank or in what manner it shall be deposited by the company.

Report, when confirmed.—No error of law committed by the commissioners on their decision upon the merits, or in the admission or rejection of evidence, can be reviewed or examined on application to confirm the report; such review can only be had on appeal. *Rochester, etc., R. R. Co. v. Beckwith*, 10 How. 168. Where the commissioners have been regular in their proceedings, and due notice of the motion for confirmation has been given, it is a matter of course to confirm their report. *N. Y. & E. R. R. Co. v. Corey*, 5 How. 177; *Albany & Northern R. R. Co. v. Cramer*, 7 id. 164. The report, if conformable to the provisions of the act, is to be confirmed. *N. Y. & Erie R. R. Co. v. Coburn*, 6 How. 224. The court cannot consider any of the objections or exceptions, except that which stated that neither the report or any of the proceedings which preceded it, properly designated the lands proposed to be taken. All the other objections and exceptions must be considered on appeal from the report after confirmation. *Matter of N. Y. & Jamaica R. R.*, 21 How. 434. Although a court has power, upon proper cause shown, to deny a motion to confirm the commissioners' report, it is not sufficient cause to show that the commissioners erred as to the *quantum* of compensation awarded. *Matter of Prospect Park, etc., R. R. Co.*, 13 Hun, 345; same case on reargument, 16 id. 261. A report may be set aside where the land-owner declined to present evidence before the commissioners on account of erroneous information as to his legal rights. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265. The Court at Special Term has power to vacate its former order confirming the commissioners' report, and to set it aside for carelessness or irregularity amounting to injurious misconduct, or for palpable mistake or accident. The exercise of this discretion is reviewable at General Term, but not in Court of Appeals. The Special Term may further proceed to revoke the appointment of the commissioners and appoint new ones. This power is inherent in the court, and not dependent on the statute. *Matter of N. Y. Central, etc., R. R. Co.*, 64 N. Y. 60; dismissing appeal from 5 Hun, 105. To same effect as to appeal to Court of Appeals, *Matter of Prospect Park & U. I. R. Co.*, 85 N. Y. 459.

Report, when set aside—The report may be set aside where it appears that the commissioners had talked privately with a person from whom they obtained information discrediting claimant's testi-

mony, and the award to him was greatly inadequate, and that his neglect to oppose the confirmation of the report arose from neglect or misconduct of his attorney. *Matter of N. Y. Central R. R. Co.*, 5 Hun, 105; *Visscher v. Hudson River R. R. Co.*, 15 Barb. 37. It is said that the court cannot suspend or correct the action of the commissioners nor set aside the proceedings, except when specially authorized by statute. Where commissioners took evidence, aside from that which was held on appeal to be a proper basis of decision, *held*, that as it did not appear that they intended any disrespect to the court, or arbitrarily to disregard its opinion, it was not such misconduct as would justify vacating the order appointing them. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 2 State Rep. 456. Where the report of commissioners appointed to appraise the damages to be awarded to an abutting owner for injuries to his easement or other interest in that portion of the street occupied by an elevated railway did not set forth the particulars of the damages, as required by the court, it was held, on motion to set the report aside, that there was no such irregularity as required such action, but that the report should be confirmed, and then all questions, both of law and fact, that could in any form be reviewed on an appeal from an order confirming the report, could be reviewed by the appellate court. *Matter of N. Y. Elevated R. R. Co.*, 35 Hun, 414. The report cannot be set aside on motion because of an error committed by the commissioners in excluding or admitting testimony to which one of the parties objected, nor because of any ordinary ruling in the progress of the trial to which an objecting party must reserve his right of review by an exception. So held as to second hearing. *Matter of N. Y. Elevated R. R. Co.*, 41 Hun, 502. But the right to make a motion to set aside the second report is distinctly recognized and announced in several cases. *Id.*

While it is true that courts will guard against improper influence and will require the avoidance of the very appearance of evil, yet no rule has yet been established which makes it necessary or proper for the court to set aside the report of commissioners simply because they have charged or received a fair and adequate compensation for the time they have given to their duties, and the services they have performed. So held where there was no agreement in advance as to fees, and after the report the commissioners were paid more than legal fees. *Matter of Staten Island Rapid Transit Co.*, 41 Hun, 393. The default of an owner upon the hearing before commissioners may be excused by the Supreme Court on motion to confirm

the report, and the report set aside and a new hearing directed. *Matter of N. Y. & Lackawanna R. R.*, 93 N. Y. 385.

Miscellaneous.—Under a statute where the General Term appointed the commissioners, and confirmation was had before it, the Court of Appeals held that the General Term had not a mere formal function and could supervise the whole proceeding, and is so far a tribunal of original jurisdiction. *Matter of Kings County Elevated Railway Co.*, 82 N. Y. 102. Where a railroad corporation makes application to acquire title to uplands on the bank of a river, it is no objection, on appeal from order confirming report of commissioners awarding damages, that the company propose to build an embankment in front of the owner's premises, cutting his pier off from the river; if his rights have been interfered with, his remedy is by action, not by appeal. *In re N. Y., W. S. & B. R. R. Co.*, 101 N. Y. 685. The proceeding may be discontinued at any time before confirmation; up to that time there is no obligation to take the land imposed upon the company. *Matter of Syracuse, etc., R. R. Co.*, 4 Hun, 311; *Hudson River R. R. Co. v. Outwater*, 3 Sandf. 689. After confirmation the corporation cannot, without leave of the court, abandon the proceedings and refuse to pay the award made to the owner upon confirmation of the report, mutual rights have vested in the parties and the corporation cannot of its own option recede. It is not necessary in order to conclude the corporation that the title to the land should have vested in it under the proceedings, it is sufficient if the right to acquire it in payment of the award is fixed. Where the railroad company is required to file the papers after an award on motion, they were ordered so to do. *Matter of Rhinebeck & Conn. R. R. Co.*, 67 N. Y. 242. See, however, provisions of next section as to this point. Where proceedings are sought to be discontinued after report and before confirmation, it is within the legitimate power of the court in granting the application to annex such terms to go with the favor as justice and fairness require, and the court is not restricted to costs and disbursements as a condition, but may in its discretion impose payment of an allowance. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. (N. S.) 190. Upon the application to confirm a report, a commissioner who has signed such report will not be allowed to stultify himself by an affidavit that he signed it without reading it or hearing it read. *Rochester & Genesee, etc., R. R. Co. v. Beckwith*, 10 How. 163. The court must act solely on the report of the commissioners, and affidavits cannot be used to impeach

or contradict it. The report must show that an error has been committed, or that injustice has been done, to enable the court to reverse or set aside the proceedings. *Rondout & Oswego R. R. Co. v. Field*, 38 How. 187. Where the parties have agreed as to the principles on which the appraisal is to be conducted, the court cannot interfere. *In re N. Y., Lackawanna & Western R. R. Co.*, 102 N. Y. 704.

Notice of Motion to Confirm Report.

(Title as in petition.)

SIR—Take notice that the report of the commissioners herein, a copy of which is herewith served on you, the petitioner, the New York, West Shore and Buffalo Railway Company, will move this court at a Special Term thereof, to be held at the City Hall, in the city of Kingston, on the 14th day of January, 1882, at the opening of the court, or as soon thereafter as counsel can be heard, for an order confirming the report of the commissioners appointed to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken by the New York, West Shore and Buffalo Railway Company, for the purposes of its incorporation.

Yours, etc.,

F. L. & T. B. WESTBROOK,

Attorneys for Petitioner.

To A. B. PARKER, Esq.,

Attorney for Owners.

Dated January 2, 1882.

Exceptions to Report.

(Title as in petition.)

GENTLEMEN—You will take notice that Andrew S. LeFevre, Elizabeth L. Conklin and Albert Conklin, and each of them hereby excepts to the report of Samuel Edwards, James E. Ostrander and James G. Lindsley, commissioners herein.

First. For that the commissioners find and report that they did “ascertain and determine that the compensation which ought justly to be made by the said The New York, West Shore and Buffalo Railway Company, to the said Andrew S. LeFevre and Elizabeth L. Conklin, owners of premises and real estate aforesaid, was the sum of \$15,000.

Second. For that the said commissioners report that the sum of \$15,000 should be allowed to Andrew S. LeFevre and Elizabeth L. Conklin for the premises described in the report, whereas the said commissioners should have reported a much larger sum as and for a just compensation to be made by the said The New York, West Shore and Buffalo Railway Company, to the said Andrew S. LeFevre and Elizabeth L. Conklin.

Third. For that the said commissioners find and report that “the said described premises (meaning the premises described in the report), contain seven hundred and seventy-eight one-thousandths (778-1000) acre; thirty-five one-thousandths acre in turnpike, one hundred and twenty-eight one-thousandths acre above high water, and six hundred and fifteen one-thousandths acre below high-water mark.”

Fourth. For that the said commissioners in and by their report

purport to compensate Andrew S. LeFevre and Elizabeth L. Conklin, for the thirty-five one-thousandths acre in turnpike referred to in said report, whereas the said commissioners refused to receive any evidence as to the amount of damages the owners would sustain by reason of the taking of the said thirty-five one-thousandths acre in turnpike, by the said The New York, West Shore and Buffalo Railway Company, for the uses and purposes of said company.

Fifth. For that the said commissioners find and report that Andrew S. LeFevre and Elizabeth L. Conklin are the owners of the said thirty-five one-thousandths acre in turnpike, while on the hearing, the said commissioners held and decided that the said Andrew S. LeFevre and Elizabeth L. Conklin had neither right, title or interest in and to said turnpike, and refused to receive the evidence offered by the owner as to the amount of damage the said owners would sustain by reason of the taking of the said thirty-five one-thousandths acre in turnpike, by the said The New York, West Shore and Buffalo Railway Company in this proceeding.

Sixth. For that the said commissioners do not find and report compensation to the owners for the amount of damage and injury that the residue of the owner's property will sustain, situated on the west side of the turnpike referred to in the report herein, and forming a part of the same tract or parcel of land with that sought to be acquired by the said The New York, West Shore and Buffalo Railway Company in these proceedings.

Dated January 12, 1882.

Yours, etc.,

ALTON B. PARKER,

Att'y for Andrew S. LeFevre, Elizabeth L. Conklin and Albert Conklin.

To Messrs. F. L. & T. B. WESTBROOK, *Att'y's for Petitioner, and*
DAVID B. OASTREE, Esq., *County Clerk of Ulster Co.*

To Messrs. F. L. & T. B. WESTBROOK:

Take notice that the written exceptions to the report of the commissioners herein, of which the within are a copy, were duly filed in Ulster county clerk's office, on the 12th day of January, 1882.

ALTON B. PARKER,

Att'y, etc., for A. S. LeFevre and others.

Objections to Confirmation of Report.

(*Title as before.*)

On the 14th day of January, 1882, the counsel for the petitioner moved the court that the report of the commissioners in the above-entitled motion be confirmed.

Andrew S. LeFevre, Elizabeth L. Conklin and Albert Conklin, by Alton B. Parker, their counsel, object to the confirmation of the report on the grounds:

First. That the commissioners excluded proper and material evidence offered by the owners in their behalf.

Second. That the commissioners, against the objection of the owners, received improper and immaterial evidence offered by the petitioner.

Third. That the commissioners erred in refusing to receive testimony offered by the owners showing the present value of the whole premises.

Fourth. That the commissioners erred in rejecting the evidence offered by the owners as to the value of the entire premises after the taking of the lands sought to be acquired by the New York, West Shore and Buffalo Railway Company in this proceeding.

Fifth. That the commissioners erred in deciding that Andrew S. LeFevre and Elizabeth L. Conklin have no interest or easement in the turnpike.

Sixth. That the commissioners erred in holding and deciding that they could not consider injury to the property on the west side of the road, because the two parcels were separated by a turnpike.

Seventh. That the commissioners erroneously held and decided that the taking of the turnpike for railroad purposes does not entitle the owners to recover of the railroad company compensation for the damages to their property resulting from such taking.

Eighth. That the report of the said commissioners purports to compensate the owners for so much of the turnpike as is described in the report herein when the said commissioners, on the hearing, excluded all evidence offered by the owners as to the amount of damages the owners would sustain by reason of the taking of such turnpike for railroad purposes.

Ninth. That the commissioners erred in awarding only the sum of fifteen thousand (\$15,000) dollars as and for compensation to be paid to the owners of the New York, West Shore and Buffalo Railway Company for the property described in the report.

Dated *January 14, 1882.*

ALTON B. PARKER,

Att'y for Andrew S. Lefevre and others.

Order of Confirmation.

At a Special Term of the Supreme Court, held in and for the county of Ulster, at the City Hall, in the city of Kingston, on the 14th day of January, 1882:

Present — Hon. Theodor R. Westbrook, *Justice.*

In the Matter of the Application of the New York, West Shore and Buffalo Railway Company to acquire title to certain real estate, of which Andrew S. LeFevre, Elizabeth L. Conklin, Albert Conklin, her husband, Charles Parrott and Eliza Knapp are the owners or persons interested.

Order confirming report.

It appearing to the satisfaction of the court that upon due notice to the parties whose interests are affected herein, the New York, West Shore and Buffalo Railway Company duly presented to the Supreme Court of the State of New York, at a Special Term thereof, held in and for the county of Ulster, at the City Hall, in the city of Kingston, on the 12th day of November, 1881, its petition in due form of law, praying for the appointment of three disinterested and competent freeholders, commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate herein-

after described proposed to be taken for the purposes of the incorporation of the said New York, West Shore and Buffalo Railway Company.

That thereupon an order was made appointing Samuel Edwards, a freeholder residing in the county of Columbia, James G. Lindsley and James E. Ostrander, freeholders residing in the county of Ulster, commissioners for the purposes aforesaid.

That the first meeting of the said commissioners was directed by terms of said order to be held at Upright's hotel, in Highland, Ulster county, on the 8th day of December, 1881, at two o'clock, P. M.

That on the 2d day of January, 1882, the said commissioners made a report of their proceedings, together with the minutes of the testimony taken therein, to the said court, whereby it appears that the said commissioners met at the time and place designated in said order, and having first severally taken and subscribed the oath prescribed by the twelfth article of the Constitution of the State of New York, proceeded to view the premises described in the petition, papers and proceeding as amended by order of this court granted on stipulation on the 31st day of December, 1881, and to hear the proofs and allegations of the parties, which premises are described in by said petition and in the report herein made as the lands for which compensation is awarded to the parties interested as follows (describe premises).

The said described premises containing seven hundred and seventy-eight one-thousandths (778-1000) acre; thirty-five one-thousandths in turnpike, one hundred and twenty-eight one-thousandths acre above high water and six hundred and fifteen one-thousandths acre below high water, said premises being situated in the town of Lloyd, Ulster county, New York.

That after the testimony in respect to said claim was closed the said commissioners, without unnecessary delay and before proceeding to the examination of any other claim, ascertained and determined that the compensation which ought justly to be made to the said owners for the real estate aforesaid, was the sum of \$15,000.

Now upon the proceedings herein and upon proof of service of a copy of this report, and notice of this motion on A. B. Parker, attorney for the owners of the property and premises affected, and after hearing F. L. & T. B. Westbrook, and J. Newton Fiero, of counsel for the petitioner herein, and A. B. Parker, Esq., of counsel for all the owners of the premises affected, opposed, it is

Ordered, that the said report and appraisal be, and the same hereby are, affirmed; and it is further ordered that the compensation herein awarded be paid as follows: \$7,500 thereof to Andrew S. LeFevre and \$7,500 to Elizabeth L. Conklin, the owners of the real estate taken.

And it is further ordered and adjudged that the owners do recover of the petitioner their taxable costs and disbursements of this proceeding, which are hereby fixed at the sum of \$67, which said sum the New York, West Shore and Buffalo Railway Company must pay to Alton B. Parker, the attorney for the owners.

Enter.

T. R. WESTBROOK.

§ 18. Order where to be recorded; its effect when company neglects to have order recorded; real estate thus acquired for public use; appeals when heard; new appraisal. A certified copy of the order, so to be made as aforesaid, shall be recorded

at full length in the clerk's office of the county in which the land described in it is situated, and thereupon and on the payment or deposit by the company of the sums to be paid as compensation for the land, and for costs, expenses and counsel fees as aforesaid and as directed by said order, with interest from the date thereof, the company shall be entitled to enter upon, take possession of and use the said land for the purpose of its incorporation during the continuance of its corporate existence by virtue of this or any other act; and all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate during the corporate existence of the company as aforesaid. If the company shall neglect to have such order recorded and to make the payment or deposit as herein provided, for the period of ten days after the date of such order, any party to such proceedings and interested therein may, at his election, cause a certified copy of the said order to be recorded as aforesaid, and thereupon the moneys therein directed to be paid, with interest thereon from the date of said order, shall be a debt against the company, and the same shall be a lien on such real estate, and may be enforced and collected by action at law or in equity in the Supreme Court, with costs. Except, nevertheless, the company may abandon such proceedings by filing, within thirty days after notice in writing of such recorded order in the office of such clerk, a notice of its determination to do so, and paying the reasonable costs and expenses of such party, to be ascertained and adjusted on motion by the court making such order. But in case of such abandonment the company shall not renew proceedings to acquire title to such lands without a tender or deposit in court of the amount of said award and the interest thereon. All real estate acquired by any company under and pursuant to the provisions of this act, for the purposes of its incorporation, shall be deemed acquired for public use. Within twenty days after the confirmation of the report of the commissioners, as provided for in the seventeenth section of this act, either party may appeal by notice in writing to the other, to the Supreme Court, from the appraisal and report of the commissioners. Such appeal shall be heard by the Supreme Court at any General or Special Term thereof, on such notice thereof being given according to the rules and practice of said court. On the hearing of such appeal the court may direct a new appraisal before the same, or new commissioners in its discretion; the second report shall be final and conclusive on all the parties interested. If the amount of the compensation to be paid by the company is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited in the bank as the court shall direct; and if the amount is diminished the difference shall be refunded to the company by the party to whom the same may have been paid, and judgment therefor may be rendered by the court on the filing of the second report against the party liable to pay the same. Such appeal shall not affect the possession by such company of the land appraised, and when the same is made by others than the company it shall not be heard except on a stipulation of the party appealing not to disturb such possession.

Effect of order of confirmation. — No right is vested in the company to the lands, or in the owner to the moneys, until the court has confirmed the report of the commissioners. *Hudson River R. R. Co. v. Outwater*, 3 Sandf. 639. When the order has been recorded and the money deposited, the title is wholly vested in the company, and no longer remains in the former owner, and the company cannot,

by changing the route, avoid paying compensation on the ground the land is unnecessary. *Crowner v. Watertown, etc., R. R. Co.*, 9 How. 457, decided before the present provision as to abandonment of the proceeding embodied in this section. Upon the consummation of the proceedings prescribed by the act all persons who have been made parties to the proceedings are divested and barred of their interest in such land, and have no longer a legal right to keep the company out of possession. *Niagara Falls, etc., R. R. Co. v. Hotchkiss*, 16 Barb. 270. Where land has been condemned the land-owner, after the payment and deposit of the award, loses all estate in the land. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12; *Matter of N. Y., W. S. & B. R. R. Co.*, 94 id. 287. The railroad company cannot acquire any greater right than that of the parties against whom they proceeded. *Anderson v. Rochester, etc., R. R. Co.*, 9 How. 553.

A railroad company, under the statute enabling it to acquire title to lands, does not acquire the same unqualified title and right of disposition to the real estate taken for the road which individuals have in their lands, but the title to the land being limited in its use for the purpose of the railroad, it is subject to the exercise of all those powers reserved to the legislature to which the franchises of the corporation are subject. *Albany & Northern R. R. Co. v. Brownell*, 24 N. Y. 345. As to lands acquired for passenger and freight purposes, see chap. 282, § 17, Laws 1854. The title vested in the company is also subject to the duty on the part of the company to make and maintain suitable farm crossings, and the right of passage of the former owner over such crossings. *Wheeler v. Rochester, etc., R. R. Co.*, 12 Barb. 227. Title vests in the company only when it has fully performed and complied with the conditions precedent, and paid or deposited the compensation as required by law. *Bloodgood v. Mohawk R. R. Co.*, 18 Wend. 9; *Beekman v. Saratoga R. R. Co.*, 3 Paige, 45; *Clarkson v. H. R. R. Co.*, 12 N. Y. 304; *Ballou v. Ballou*, 78 id. 325. As to the right of the owner and effect of appraisal of damages, see *Gould v. H. R. R. Co.*, 6 N. Y. 522, as to riparian rights. It is said, § 216, Mills on Eminent Domain, that all elements of damages should be presented to the commissioners assessing the damages. The appraisement embraces all past, present and future damages which the improvement may thereafter reasonably produce. But it is not to be assumed that the railroad will use unsafe appliances or perform a tortious act. *Mayor v. Bailey*, 2 Den. 233.

Appeals.—Any person deeming himself aggrieved may appeal. *N. Y. & Erie R. R. Co. v. Corey*, 5 How. 177. And where the report embraces several interests, any person interested and made a party may appeal from such part of the report as affects him. *Troy & Rutland R. R. Co. v. Cleveland*, 6 How. 238. An appeal lies to the Court of Appeals from an order of the General Term, affirming an order of the Special Term in proceedings to acquire lands involving the question of the right to condemn such lands under the statute. *Rensselaer & S. R. R. Co. v. Davis*, 43 N. Y. 137. But it will not review matters of discretion. *N. Y. Central R. R. Co. v. Marvin*, 11 N. Y. 279; *Matter of N. Y. C. & H. R. R. Co.*, 64 id. 60; *Matter of Kings County Elevated R. R. Co.*, 82 id. 100. On appeal to the Court of Appeals no objections can be raised as to the irregularity in the proceedings, which were not taken below. *Buffalo & N. Y. City R. R. Co. v. Brainard*, 9 N. Y. 100. An order of the Supreme Court denying the owner's applications to have the report sent back with directions to state the ground of the commissioner's decision rests in discretion, and is not reviewable in the Court of Appeals; so, also, as to an order based on conflicting evidence, refusing to set aside an award on the ground of misconduct. *Matter of Prospect Park R. R. Co.*, 85 N. Y. 489; dismissing appeal from 24 Hun, 199. An appeal from an order awarding damages for lands condemned is a judicial proceeding, and an appeal in such proceeding is not reviewable in the Court of Appeals, except in case of a final order. The order made does not become final because the appraisal to be made by new commissioners may be final and conclusive under section 18. The Court of Appeals has no jurisdiction to review an order of the General Term, reversing an order of the Special Term making an award for lands condemned, and directing a new appraisal where it does not appear that the order was not made in the exercise of the discretion confided in the court by the act, and the court cannot look into the opinion of the General Term for the grounds of the decision. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. An appeal from so much of an order of the General Term, reversing an award confirmed by the Special Term, as refused to appoint new commissioners, when the latter were named in a stipulation, is reviewable in the Court of Appeals. *Matter of N. Y. & Lackawanna, etc., R. R. Co.*, 98 N. Y. 447. An appeal lies to the General Term from the order of the Special Term, confirming the report of commissioners. *Rochester, etc., R. R. Co. v. Beckwith*,

10 How. 168; *Rondout & Oswego R. R. Co. v. Field*, 38 id. 187. This is so, even though the appeal may have been heard in the first instance at Special Term, as is provided by this section. *Matter of Kings Bridge Road*, 4 Hun, 599; affirmed 62 N. Y. 645; *Albany & S. R. R. Co. v. Dayton*, 10 Abb. (N. S.) 182; *Matter of N. Y., W. S. & B. R. R. Co.*, 33 Hun, 231. See also, *In re Commissioners of Central Park*, 4 Lans. 471; *Rensselaer & Saratoga R. Co. v. Davis*, 43 N. Y. 146; *R. & G. R. R. Co. v. Beckwith*, 10 How. 169. In a recent case, a query is made as to whether the appeal should be from the report and appraisal, or from the order of confirmation. The point seems to be a substantially new one, the practice having been to appeal "from the appraisal and report, and from the order made thereon," thus covering both branches of the question.

In the absence of allegations of improper conduct on the part of a commissioner who was not a freeholder, the General Term will not entertain an application to set aside a report on that ground when the point was not raised below. *Matter of N. Y., W. S. & B. R. R. Co.*, 35 Hun, 575. The rule which deprives a party of the right to appeal from an order or judgment under which he has taken a benefit is not applicable to these proceedings, and the right to appeal is not affected by accepting payment for the land and giving a receipt therefor. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. Where a report of damages is set aside and new proceedings are instituted, in which the company deposits a sum of money in court to secure any award that may be made, and upon confirmation of a second award pays the damages and takes possession, this does not bar the right of appeal. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 646.

Notice of Appeal.

SUPREME COURT — ULSTER COUNTY.

In the Matter of the Application of
The New York, West Shore and
Buffalo Railway Company to acquire
title to lands, of which Andrew S.
LeFevre, Elizabeth L. Conklin and
others are owners or interested.

SIRS — Take notice that Andrew S. LeFevre, Elizabeth L. Conklin and Albert Conklin appeal to the General Term of the Supreme Court from the appraisal and report of Samuel Edwards, J. E. Ostrander and Jas. G. Lindsley, commissioners appointed by the said

court to ascertain and determine the compensation to be made to the owners or persons interested in the real estate proposed to be taken for the purposes of the incorporation of said The New York, West Shore and Buffalo Railway Company, and from the order made thereon.

Yours, etc.,

Dated January 14, 1882.

ALTON B. PARKER,

Att'y for Andrew S. LeFevre and Elizabeth L. Conklin.

To Messrs. F. L. & T. B. WESTBROOK, *Att'ys for Petitioner, and*

DAVID B. CASTREE, *County Clerk of Ulster County.*

Grounds upon which appraisal will be set aside on appeal.— The Supreme Court will not set aside an award for every technical error. where no injustice appears to have been done. *N. Y. Central R. R. Co. v. Marvin*, 11 N. Y. 279; citing *Troy & Boston R. R. Co. v. Northern Turnpike Company*, 16 Barb. 100, which holds that the error to be reviewed must be of such a character as to show that the commissioners misapplied the principles upon which they were required to make their appraisal, and that the party appealing may have been injuriously affected by such misappropriation. Same principle, *Matter of Rondout & Oswego R. R. Co. v. Deyo*, 5 Lans. 298; *Matter of Bushwick Avenue*, 48 Barb. 9; *Troy & Boston R. R. Co. v. Lee*, 13 id. 169. Only the record before the commissioners can be reviewed. *N. Y. & Erie R. R. Co. v. Coburn*, 6 How. 223; *N. Y. & Erie R. R. Co. v. Corey*, 5 id. 177; *Rochester & Syracuse R. R. Co. v. Budlong*, 6 id. 467; *Rochester & Genesee Valley R. R. Co. v. Beckwith*, 10 id. 168; *Rondout & Oswego R. R. Co. v. Field*, 38 id. 187. The appellate court will not disturb an appraisal for technical errors, or unless the commissioners have clearly gone astray and disregarded legal principles. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Arnott*, 27 Hun, 151; *Matter of N. Y., West Shore & B. R. R. Co. v. Dudleston*, 29 id. 609; *Troy & Boston R. R. Co. v. Lee*, 13 Barb. 169; *N. Y., West Shore & B. R. R. Co. v. Gennet*, 37 Hun, 317. In reversing an order of the Special Term appointing commissioners of appraisal on application of the railroad company, it is the duty of the court at General Term to examine the evidence and determine whether the petitioner has fairly made out a case establishing that the premises are necessary for its use; when this appears, and where the company has acted in good faith and exercised a reasonable discretion, the court will not interfere, although in a proper case it has the power. *N. Y., Lackawanna, etc., R. R. Co. v. Union Steamboat Co.*, 35 Hun, 220. A report which awards a moderate compensation to the property-owner will not be disturbed. *Matter of N. Y., Woodhaven,*

etc., *R. R. Co.*, 21 Hun, 250. A report will not be set aside unless the sum awarded is grossly inadequate, or some wrong principle was adopted in determining it. *Matter of Boston R. R. Co.*, 27 Hun, 409. The court will not set aside an appraisal as excessive, unless the excess is plain and palpable upon the evidence. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 27 Hun, 116. It is not sufficient ground to set aside an appraisal, that during an examination of the premises by the commissioners, one of them was separated a part of the time from the others. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265.

If the commissioners reject legal and competent evidence, or mistake the principle that should govern the appraisement, the award should be set aside. *Matter of N. Y. C. R. R. Co.*, 15 Hun, 63. As to what is sufficient evidence of misconduct to set aside report, see *Matter of N. Y. C. R. R. Co.*, 5 Hun, 105. The report of the commissioners cannot be affected by a certificate signed by one of them, setting forth the rule adopted by them in estimating the damages, nor will such a certificate cure any error by the commissioners. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 29 Hun, 1. A report of damages will be set aside where land-owner declined to produce witnesses before the commissioners, in consequence of erroneous information as to his legal rights. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 63 How. 265. See, also, *N. Y., Lackawanna & W. R. R. Co. v. Wolfe*, 29 Hun, 602.

The report may be set aside where it appears the commissioners had talked privately with a person from whom they had obtained information discrediting the claimant's testimony, and the award to him was greatly inadequate, also where neglect to oppose the confirmation of the report arose from neglect or misbehavior of his attorney, on whom notice of motion was served. *Matter of N. Y. Central R. R. Co.*, 5 Hun, 105; appeal dismissed, 64 N. Y. 60. Where the commissioners awarded much less than the value of the property taken, according to the testimony of every witness put upon the stand, it was held an arbitrary exercise of power not justified by law. *N. Y., West Shore & B. R. R. Co. v. Yates*, 18 Week. Dig. 272. Where counsel sent a letter to the commissioners after the case had been submitted to them, but the letter contained only certain computations which had been made orally before the commissioners, held an irregularity, but not such as to vitiate the report. *N. Y., West Shore & B. R. R. Co. v. Church*, 31 Hun, 440. It is error to charge the owner with service and expenses of

commissioners in a case where a less amount was awarded than the company had offered, when it appeared that the acceptance of the offer would have deprived the owner of costs in a pending ejectment suit. *Ulster & Delaware R. R. Co. v. Gross*, 31 Hun, 83. See cases cited under section 17, relative to confirmation of report.

Second report.—The provision that the determination as to damages for land taken, made by commissioners of appraisal in their second report, shall be final and conclusive precludes as well a review by a common-law *certiorari* as by appeal. *People, ex rel. Schuylerville, etc., R. R. Co. v. Betts*, 55 N. Y. 600. Such second report being final and conclusive in itself, it needs no order of confirmation, and is not reviewable on appeal. *Matter of Prospect Park & C. I. R. R. Co.*, 85 N. Y. 489; dismissing appeal from 24 Hun, 199. Only legal errors and irregularities can be reviewed on second report. The judgment of the commissioners, in deciding upon the amount of damages to be allowed, cannot be reviewed. *Matter of Prospect Park & C. I. R. R.*, 20 Hun, 184. To authorize a court to review on motion a second report, something more must be apparent than such errors of law or fact as are reviewable on appeal, and which would, if established, require a reversal and new hearing. There must be such an irregularity, fraud or mistake in the proceedings of the commissioners as would authorize the court under its established practice to set aside a judgment or verdict in an action on a motion. The report cannot be set aside because of an error committed by the commissioners in hearing or excluding testimony to which one of the parties objected, nor because of any ordinary ruling in the progress of a trial to which an objecting party must reserve his right of remedy by an exception. *Matter of N. Y. Elevated R. R. Co.*, 41 Hun, 502. Although under the statute the petitioner cannot on appeal obtain a review on the merits of the second award, yet it is within the power of a court of equity to set aside any excessive award obtained by fraud or misconduct of the commissioners. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 2 State Rep. 456. The Supreme Court may set aside the second report and remove the commissioners on account of gross error and misconduct. *Matter of Prospect Park & C. I. R. R. Co.*, 20 Hun, 184. A method of correcting error on a new appraisal may arise should the new appraisers proceed on fundamentally erroneous views of the law. *Matter of N. Y. & Harlem R. R. Co.*, 98 N. Y. 12. The refusal of commissioners to conform to the decision of the Supreme Court on the

first hearing is misconduct for which they may be removed. *N. Y., Lackawanna & W. R. R. Co. v. Bennett*, 2 How. (N. S.) 225. The rule that the court may inquire into the fairness and regularity of the commissioners' acts, notwithstanding the provisions that the second report shall be conclusive, *held* to apply where the commissioners examined the premises and listened to the owner's representations concerning the same in the absence of a representative of the company. The commissioners have no right to accept gratuities from either party, or to accept money in excess of what is allowed by law after the report is signed. *Matter of B., N. Y. & P. R. R. Co.*, 32 Hun, 289.

The statute requires the person receiving the first award to repay the difference between the first and second award, where the second is smaller than the first, and he is not obliged to pay interest thereon except from the date of notice of confirmation of the last award. *Matter of N. Y. Elevated R. R. Co.*, 44 Hun, 117. The statute as to conclusiveness of second award does not apply when the proceedings on the first appraisal are dismissed on appeal, without a refusal of confirmation, or any direction for new appraisal and new proceedings are instituted. *Matter of N. Y., W. S. & B. R. R. Co.*, 29 Hun, 646.

Costs.-- A proceeding to acquire land under the General Railroad Act is a special proceeding, and the court has power, in its discretion, to allow costs in such proceedings at the rate allowed for similar services under the Code. *Matter of Rensselaer & S. R. R. Co. v. Davis*, 55 N. Y. 145; *Matter of Syracuse, B. & N. Y. R. R. Co.*, 4 Hun, 311; *Matter of N. Y., Lackawanna & W. R. R. Co.*, 26 id. 592. But no extra allowance can be granted. 55 N. Y., *supra*; *Matter of Syracuse, B. & N. Y. R. R. Co.*, 4 Hun, 311. When no issue of fact is raised or tried, a trial fee cannot be allowed, although witnesses' fees and disbursements may be allowed. 26 Hun, 592, *supra*. The General Term has no power, on reversing an order confirming a report of commissioners, awarding damages, to award costs against the land-owner. *Matter of N. Y., W. S. & B. R. R. Co.*, 94 N. Y. 287. One petition to acquire the land of several owners is but one proceeding, and requires one appeal and one allowance of costs. *Matter of Prospect Park, etc., R. R. Co.*, 67 N. Y. 371; affirming 8 Hun, 30. An extra allowance can be granted as a condition of discontinuance after report and before confirmation. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. (N. S.) 190.

§ 19. *Adverse claims to compensation ; how settled.*—If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the company, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and order are to be made.

The provisions of this section are not in violation of the Constitution. The money directed to be paid may be deposited in bank under the order of the court, and when so deposited, it takes the place of the land as to the owner, and is the property of the parties entitled to compensation. There may be conflicting claimants to the fund, and the intervention of the court may be necessary for its distribution, or for the adjustment of liens. The fund is subject to the same liens to which the land was, before being taken. It does not affect the validity of an order, whether it directs the money to be drawn out on *ex parte* application, or on notice. *Matter of N. Y. C. & H. R. R. Co.*, 60 N. Y. 116.

§ 20. *Protection of unknown parties ; amending proceedings.*—The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown, or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this act, as may be necessary; or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any one who shall die, or refuse, or neglect to serve, or be incapable of serving.

Infant.—To bind an infant land-owner it is necessary that some proper person should be appointed as guardian or attorney to attend personally to the interests of the infant upon the appraisal. *Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. 600.

Power of the court.—The Supreme Court has power to vacate an order confirming the report of commissioners of appraisal, and thereupon to set aside the report and to appoint new commissioners. The owner is not confined to the remedy by appeal to the General Term given by the Railroad Act. Where cause is shown for setting aside the proceedings, the court is the judge of the sufficiency thereof, and the granting such relief is within its discretion, the exercise whereof may be reviewed by the General Term, but not in the Court of Appeals. *Matter of N. Y. C. & H. R. R. Co.*, 64 N. Y. 60.

The Court of Appeals cannot review conflicting evidence. *Matter of Prospect Park & C. I. R. Co.*, 85 N. Y. 494. Where no irregularity appears to have intervened in any form in what took place before the commissioners, the report cannot be set aside. *Mat-*

ter of N. Y. Elevated R. R. Co., 35 Hun, 417. Where commissioners were appointed and made a report which was reversed on appeal by the General Term, and that decision affirmed by the Court of Appeals, the matter was sent back to the same commissioners, the appellate court holding they had no power to appoint other commissioners than those named in an agreement made between the owner and the company, it was held that the court, on motion pending the second hearing, could vacate the order appointing the persons named to act as commissioners, upon the ground of misconduct. The court was not required to send the petitioner to a court of equity to obtain a decree. *Matter of N. Y., Lackawanna & W. R. R. Co.*, 40 Hun, 130. Where, upon a hearing before commissioners, the owner makes default, the Supreme Court has power, on motion to confirm the report of the commissioners, the default being excused, to open it, set aside the report, and order a new hearing. *Matter of N. Y., Lackawanna & W. R. R. Co. v. Wolfe*, 93 N. Y. 385; affirming 29 Hun, 602. It is good cause for the Special Term to set aside the proceedings in such cases if there has been such carelessness or irregularity on the part of the commissioners as amounts to misconduct, by which a party has been harmed. The same reason which would lead to the setting aside of the verdict of a jury, or report of a referee, for the misconduct, palpable mistake or accident of either, will suffice for the like interference with the report of commissioners, and what would authorize the Special Term to excuse the default of a party, and to set aside an inquest or dismissal of a complaint taken at a circuit, will empower it to interfere in these cases. *Matter of N. Y. C. & H. R. R. Co.*, 64 N. Y. 60.

Laws 1854, chap. 282, § 5. *Courts empowered to carry proceedings into effect.*—In all cases of appraisal under this act and the act hereby amended, where the mode or manner of conducting any or all of the proceedings to the appraisal, and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders, and give the proper directions to carry into effect the object and intent of this and the aforesaid act; and the practice in such cases shall conform, as near as may be, to the ordinary practice in such courts.

Under this statute the Supreme Court has power to make an order or issue process to put a railroad company in possession of lands acquired by proceedings under the General Act. The object of the amendment was to give the court the same power in such proceedings to carry into effect the object and intent of the act which they had to carry into effect their own judgments and decree, and to assimilate the practice to that established in actions. *Matter of N.*

Y. C. & H. R. R. Co., 60 N. Y. 116. The authority of this section was not necessary to enable the court to carry out the powers conferred on it by the General Railroad Act ; such a power was incident to the grant of powers under that statute, and enlarged construction should be given to the authority conferred. The order is in the nature of a writ of assistance. *Matter of N. Y. C. & H. R. R. Co.*, 2 Hun, 482. See, also, *Matter of Rhinebeck & Conn. R. R. Co.*, 8 id. 34 ; S. C., 67 N. Y. 242.

§ 25. *State land, how acquired by company.*—The commissioners of the land office shall have power to grant to any railroad company, formed under this act, any land belonging to the people of this State which may be acquired for the purposes of their road, on such terms as may be agreed on by them; or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon. The land included in the State reservation at Niagara and the concourse lands on Coney Island are expressly exempted from the provisions of this section.

This section relates to lands of which the State, or a county or town is the proprietor, not that held in trust for the uses of the public. *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 578. The navigable waters of this State belong to the people thereof, and the riparian owner has no private property either in the waters of such rivers or in the strip of land between high and low-water mark. Such strip of land below high-water mark may, therefore, be taken for public use without making compensation to the riparian owner, even though connection between his land and the river is thereby cut off. *Gould v. N. Y. C. & H. R. R. Co.*, 6 N. Y. 522.

§ 26. *Title, how acquired when trustees, guardian or committee are not authorized to sell.*—In case any title or interest in real estate, required by any company formed under this act for the purpose of its incorporation, shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind, the Supreme Court shall have power, by a summary proceeding on petition, to authorize and empower such trustee, or the general guardian or committee of such infant, idiot or person of unsound mind, to sell and convey the same to such company for the purpose of its incorporation, on such terms as may be just; and in case any such infant, idiot, or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed by an owner of said land having legal power to sell and convey the same.

This provision is for the benefit of the trustee, and infant or idiot owner, and is not compulsory upon the railroad company. *Matter of N. Y. Bridge Co.*, 4 Hun, 635. The trusts meant by this provision are private and individual trusts, and not public trusts or property held by corporations for public use; but one class of trusts was intended, and that was the class of private trusts within the same category, and the same general rules as are applicable to individuals and private property held by those incompetent to sell the same. It would be an unwarrantable extension of the provision by implication to include within it all public, as well as all private and conditional trusts. Other legislative provisions show that property held by public officers or public bodies for public use was not intended to be included by its terms. *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 578.

The provisions of this statute are so closely assimilated to the ordinary proceedings for the sale of real estate of an infant or lunatic as prescribed by statute, that no precedents are deemed necessary. In fact, no reason exists why the same proceedings should not be had for the purposes of this statute. Attention is called to Laws 1857, chapter 444, section 2, for provisions of statute as to acquiring estates of inheritance, for life, for years, at will, or sufferance, there described as special estates. The petition is required to allege "the facts in relation to any such estate, and the person or class of persons then in being, or not in being, who are or may become entitled, in any contingency, to any estate as aforesaid, in such land, and may pray that such estate may be acquired and such persons may be bound by the said proceedings."

§ 28, sub. 5. *May construct road across any stream, canal and highway; bridges or obstructions prohibited; streets in cities not to be used without consent of corporation, not along highways without consent.*—To construct their road across, along or upon any stream of water, water-course, street, highway, plankroad, turnpike, or across any of the canals of this State, which the route of its road shall intersect or touch; but the company shall restore the stream, or water-course, street, highway, plankroad and turnpike, thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness. Every company formed under this act shall be subject to the power vested in the canal commissioners by the seventeenth section of chapter 276 of the Session Laws of 1834. Nothing in this act contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sail-boats, at the place where any bridge or obstructions may be proposed to be placed; nor to authorize the construction of any railroad not already located upon any, or across any streets on any city without the assent of the corporation of such city; nor to authorize any such railroad company to construct its road upon and along any highway without the order of the Supreme

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Court of the judicial district in which said highway is situated, made at a Special Term of said court, after at least ten days' notice in writing of the intention to make application for said order shall have been given to the commissioners of highways of the town in which said highway is situated.

LAWS OF 1851, CHAPTER 19.

§ 4. *Damages for crossing turnpike or plankroad.*—In case any railroad shall occupy or cross any turnpike or plankroad, the railroad company shall pay such turnpike or plankroad company all damages the turnpike or plankroad company may sustain by reason of the occupancy or crossing such turnpike or plankroad, the damages to be ascertained and paid in the same manner as is provided by law for the assessment and payment of damages, in case of taking private property for the use of railroad companies.

LAWS OF 1885, CHAPTER 300.

§ 1. *Lawful for commissioners of highways having supervision thereof, to give written consent for construction across road or highway.*—Whenever any association or individual shall construct a railroad upon land purchased for that purpose, on a route which shall cross any road or other public highway, it shall be lawful for the commissioners of highways having the supervision thereof, to give a written consent that such railroad may be constructed across or on such road or other public highway, and thereafter such association or individual shall be authorized to construct and use such railroad across or on such roads or other highways as the commissioners aforesaid shall have permitted, but any public highway thus intersected or crossed by a railroad shall be so restored to its former state as not to have impaired its usefulness.

LAWS OF 1882, CHAPTER 140.

§ 1. *Lawful to build railroads on or across highway; proviso as to consents to be obtained; act not to apply to villages and cities; must not interfere with or obstruct use of any highway.*—It shall be lawful for any individual, company, association or private corporation to build and operate solely for the purpose of conducting the business of such individual, company, association or corporation, a railroad on or across any highway, provided that consent in writing and under seal of the owners of all lands on which any such railroad may be built, abutting a highway, be first obtained; and provided further that the consent in writing of the supervisor of the town in which any railroad proposed to be built under this act is located be also first obtained; and provided further, that this act shall not apply to any city or village; and provided further, that no such railroad shall be so located, graded, built or operated as to interfere with or obstruct the traveled part of any highway, or interfere with or obstruct the public use of any highway or any highway intersecting the same.

LAWS OF 1855, CHAPTER 255.

§ 1. *Commissioners empowered to bring action against any railroad corporation to sustain rights of the public in and to any highway; to enforce any duty enjoined upon a railroad corporation; may maintain action for damages.*—The commissioner or commissioners of highways in each of the towns of this State are hereby empowered to bring any action against any railroad corporation that may be necessary or proper to sustain the rights of the public in and to any highway in such town, and to enforce the performance of any duty enjoined upon any railroad corporation in relation to any highway in the town in which they are commissioners, and to maintain an action for damages or expenses which any town may sustain or may have sustained, or may be put to or may have been put

to in consequence of any act or omission of any such corporation, in violation of any law in relation to such highway.

See, also, chapter 62, Laws of 1853, to laying out highways over railroad tracks.

Under this statute a railroad company has no right to enter upon a turnpike or plankroad without the consent of the owners, without first paying damages as assessed by the statute. *Ellicottville & G. Plankroad Co. v. Buffalo & C. R. R. Co.*, 20 Barb. 644; *Jamaica & Brooklyn Plankroad Co. v. N. Y., etc., R. R. Co.*, 25 Hun, 585. A railroad company in crossing a highway is bound so to construct its track as not to impair the usefulness and convenience of the highway, and to keep it in suitable repair for that purpose. *Gale v. N. Y. Central R. R. Co.*, 76 N. Y. 594; *Corey v. Buffalo, etc., R. R. Co.*, 23 Barb. 482; *Mosher v. Utica, etc., R. R. Co.*, 8 id. 427; *Baxter v. Spuyten Duyvil, etc., R. R. Co.*, 61 id. 428; *The People, ex rel. Schaghticoke, v. Troy & B. R. R. Co.*, 37 How. 427; *Wilson v. City of Watertown*, 3 Hun, 508; *Richardson v. N. Y. C. R. R. Co.*, 45 N. Y. 846; *Wasmer v. Del., Lack., etc., R. R. Co.*, 80 id. 212; *Matter of N. Y., C. L. & W. R. R. Co.*, 33 Hun, 153; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98.

They may cross above or below grade according to the necessities of the railroad. *Conklin v. N. Y. & W. R. R. Co.*, 1 State Rep. 677. It may be restored in a different manner, but not so as to impair its usefulness. *Id.* And failure to so restore the highway renders the company liable for injuries suffered by any person by reason of such neglect. *Richardson v. N. Y. Central R. R. Co.*, *supra*. A *mandamus* is the proper remedy to compel a railroad company to keep and maintain a bridge in order which was built by it to restore a highway to its former condition of usefulness. *People, ex rel., v. Troy & Boston R. R. Co.*, 37 How. 427. While a railroad company has a discretion as to the manner of performing the duty required under this subdivision the discretion is a ministerial one; the act of restoration must be done; as to that there is no discretion. The court has power by *mandamus* to point out and enforce the duty of the corporation; the duty of the restoration carries with it the necessary powers for that purpose, and among them the power to take lands compulsorily where a removal or a change of the highway is necessary, and to accomplish this, such lands may be acquired. *People, ex rel. Green, v. D. & C. R. R. Co.*, 58 N. Y. 152. A railroad company cannot construct a road across a highway at grade without an order of the court made upon notice to the

highway commissioners. *Osborne v. Jersey City, etc., R. R. Co.*, 27 Hun, 589. See contra, *Baxter v. Spuyten Duyvil R. R. Co.*, 11 Abb. (N. S.) 178. It is the duty of a railroad company to restore an intersecting highway to good repair without regard to the fact that a street railroad company whose track is laid on such highway is obliged by law to keep the same in repair within the rails. *Marterson v. N. Y. Central R. R. Co.*, 84 N. Y. 247. In determining what is its former condition of usefulness, the railroad company is to be allowed such use and occupancy as is necessary for the construction and maintenance of its road in a proper manner. *Corey v. Buffalo, etc., R. R. Co.*, 23 Barb. 482. This section is to be construed as granting only the right the public have in streams, streets, highways, etc., and not as attempting to grant any right to violate private property without the consent of the owners. *Ellicottville, etc., Plankroad Co. v. Buffalo, etc., R. R. Co.*, 20 Barb. 644. A railroad company gives no title to the fee of a highway without the consent of the owner of the fee or the appraisal and payment of damages in the mode provided by law. *Williams v. N. Y. Central R. R. Co.*, 16 N. Y. 97. A railroad company in locating its road may change the site of a bridge used by a turnpike company, and the approaches to the same without affecting right of the latter to the tolls. *Matter of N. Y., W. S. & B. R. R. Co.*, 28 Hun, 472. A railroad company, though authorized to use a public highway, is liable to an individual for consequential damages sustained by reason of their mode of using it. *Fletcher v. A. & S. R. R. Co.*, 25 Wend. 462. See *Presbyterian Society v. A. & S. R. R. Co.*, 3 Hill, 567; *Seneca R. R. Co. v. A. & S. R. R. Co.*, 5 id. 170; *Matron v. U. & S. R. R. Co.*, Lalor's Supp. 156; *Conklin v. N. Y., O. & W. R. R. Co.*, 102 N. Y. 107. The occupation of a public highway by a railroad is the imposition of an additional burden for which the owner of the fee is entitled to compensation. *Presbyterian Society v. A. & S. R. R. Co.*, 3 Hill, 567; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 197; *Wager v. Union R. R. Co.*, 25 id. 526. The crossing of a public highway at a grade is not unlawful, and, therefore, will not be restrained by injunction. *Baxter v. Spuyten Duyvil, etc., R. R. Co.*, 61 Barb. 428. A railroad company that constructs its road across a highway below grade is not necessarily bound to construct a bridge the full width of the highway; its duties in that respect depend upon the peculiar circumstances of the case. *People v. New York, N. H. & H. R. R. Co.*, 89 N. Y. 266. The statute not only requires a company crossing a

stream to make the channel as perfect as practicable, but to construct and preserve it in that state as long as they continue to divert the stream from its natural channel. If the stream is diverted, the company is bound to restore and preserve it in its natural state as nearly as may be, if requisite to secure the interests of owners of land upon such stream. *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214. As to liability of railroad company for damages in case of failure to restore a stream to its former usefulness, see *Brown v. Cayuga, etc., R. R. Co.*, 12 N. Y. 486; *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. 512. As to right to cross waters of navigable streams as against adjoining owner, see *Gould v. H. R. R. Co.*, 6 N. Y. 522. That the usefulness of the stream must not be impaired by a bridge erected by railroad company, see *People v. Rensselaer R. R. Co.*, 15 Wend. 113; *Weaver v. Rensselaer & S. R. R. Co.*, cited in *Mohawk Bridge Co. v. Utica & S. R. R. Co.*, 6 Paige, 554.

Precedent for Petition for Leave to Run Across, Upon, and Along Highway.

SUPREME COURT.

<p>In the Matter of the Application of the Wallkill Valley Railroad Company agst. The Commissioners of Highways of the Town of Rosendale.</p>	}
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To the Supreme Court of the State of New York:

The petition of the Wallkill Valley Railway Company respectfully shows to the court: That the said railway company is duly incorporated under the laws of the State of New York, and is engaged in the construction of the line of its proposed railroad from Montgomery in the county of Orange, to Kingston, in the county of Ulster; that heretofore and before the commencement of such construction, it filed a map and profile of the route intended to be adopted by said company in the county of Ulster, including the town of Rosendale, duly certified, as required by statute, and gave written notice of such filing to all the occupants of the land over which the route of the road is so designated. That said line of its said road crosses the public highway in road district number 9, in said town of Rosendale, near the house of Garton J. Keator, as such line is laid down on said map, a copy of which map, showing the location of said crossing, is herewith served, and runs upon and along the same as thereon shown. That your petitioner has acquired the right of way for the line of its road upon both sides of said highway at all the points where it crosses or runs upon or along said highway. That Franz Schrowang, Peter Conner and Silas Snyder are commissioners of highways of said town of Rosendale, and that said commissioners are unwilling to consent to the construction of your petitioner's railroad across, upon or along

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said highway at the point shown on said map so filed and served. (Fuller description may be inserted if desired.) That your petitioner is willing and intends to restore said highway to such state as not unnecessarily to have impaired its usefulness.

THE WALLKILL VALLEY RAILROAD CO.,
By THOMAS CORNELL, *President.*

(*Verification as to pleading.*)

Precedent for Notice of Application for leave to run across, upon or along Highway.

(*Title as in petition.*)

To FRANZ SCHROWANG, PETER CONNER and SILAS SNYDER:

Please take notice, that upon the annexed petition and map accompanying the same, copies of which are herewith served on you, the Wallkill Valley Railway Company will apply to the Supreme Court, at a Special Term thereof, to be held at the City Hall, in the city of Albany, on the 27th day of August, 1885, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting leave to the petitioner, the Wallkill Valley Railway Company, to construct the line of its railway across, upon and along the highway in the town of Rosendale, near the house of Garton J. Keator, as such line is shown on the map served and according to the prayer of the petitioner, or for such other or further relief as to the court may seem just.

THE WALLKILL VALLEY RAILWAY COMPANY,
By BERNARD & FIERO, *its Attorneys.*

(*Caption usual form.*)

Present — Hon. William L. Learned, *Justice.*

(*Title as above.*)

On reading and filing notice of application in behalf of the Wallkill Valley Railway Company for an order to run across and upon the highway at district number nine, in the town of Rosendale, and proof of service of the same on the commissioners and affidavits in support of the application, and after hearing J. N. Fiero, of counsel for the railroad company, in favor of the application, and D. M. De Witt appearing on behalf of the commissioners of highways of Rosendale, opposed,

Ordered, that the Wallkill Valley Railroad Company have leave and be allowed to run and authorized to construct its road across, upon and along the public highway in said town of Rosendale, near the house of Garton J. Keator, at the point where the line of said railroad as changed from its first line on the lands of F. O. Norton crosses and runs upon and along said highway, as such crossing and location is shown on a map of such changed location duly filed in Ulster county clerk's office and on a map heretofore served.

W. L. LEARNED,
Justice Supreme Court.

§ 28, sub. 6. *Right to cross, intersect, etc., other roads; proceedings in case two corporations cannot agree; companies shall receive from each other and forward freight. —To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the ground of such other railroad*

company, with the necessary turn-outs, sidings and switches and other conveniences in furtherance of the objects of its connection. And every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the line or lines, the grade or grades, points and manner of such crossing and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer, to be appointed by the courts, as is provided in this act in respect to acquiring title to real estate; and said commissioners shall have full power to determine whether the crossing or crossings of any railroad before constructed shall be beneath, at or above the existing grade of any such railroad, and upon the route designated on the map of the company seeking the crossing required to be filled by section twenty-two of this act, or otherwise. And all companies, as aforesaid, shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads with the same dispatch, and at a rate of freight not exceeding the local tariff rate charged for similar goods, merchandise and other property received at and forwarded from the same point for individual and other corporations.

This section seems to provide the means of determining all questions involved as between railroad companies, where one seeks to carry its line across the line of another. *Matter of L. S. & M. S. R. R. Co.*, 89 N. Y. 442; followed by *Matter of N. Y., Lake Erie & W. R. R. Co.*, 44 Hun, 215. A city railroad acquires an exclusive right in its track. No other company can be authorized to use it in common with the owners of the franchise. *Brooklyn, etc., R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358. But another company may be authorized to cross its track or to construct a portion of its road on the same street. *Brooklyn, etc., R. R. Co. v. Coney Island, etc., R. T. R. Co.*, 35 Barb. 364. Where two companies obtain the right to lay their tracks on a public street, the one that first takes possession has the preference as to location. *Dry Dock, etc., R. R. Co. v. N. Y. & H. R. R. Co.*, 54 Barb. 388. As to proper averments in a petition under this subdivision, see *Matter of Boston, etc., R. R. Co. v. Troy & Boston R. R. Co.*, 58 How. 167; *Matter of Lockport, etc., R. R. Co.*, 77 N. Y. 557. The petition need not state the facts required where it is sought to acquire land under section 14. But the petition must allege a failure to agree by the two companies, and when that allegation is denied the burden of proof is on the petitioner as to that fact, and such failure to agree, and an effort in good faith to agree, is a condition precedent to the proceeding. *Matter of Lockwood & Buffalo R. R. Co.*, 77 N. Y. 557; reversing 15 Hun, 365; *Matter of Boston, Hoosac, etc., R. R. Co.*, 79 N. Y. 70. An express vote of the directors of the company is not necessary to show a failure to agree with refer-

ence to the proposed crossings, it appearing that the president of one of the companies had refused to agree. *Matter of Cortland, etc., R. R. Co.*, 31 Hun, 72; affirmed without opinion, 95 N. Y. 663.

The General Railroad Act authorizes more than one crossing by a railroad company of the track of another road, and the fact that the road of the petitioner's company at some points is parallel with the road sought to be crossed does not exclude said company from the provisions of the act. *Matter of Boston, Hoosac T. & W. R. R. Co.*, 79 N. Y. 64. It seems the act does not authorize the invasion of lands or buildings already appropriated to railroad uses which in their nature require an exclusive occupation, or which would be materially impaired by subjecting the land to a new use. *Id.* The commissioners should determine not only the physical means and conditions of crossing, but also such necessary requirements or provisions in the manner of crossing as would ordinarily be made under the circumstances by the parties with due regard to public safety. *Matter of Lockport, etc., R. R. Co.*, 19 Hun, 38. It is proper for the commissioners to consider, in their estimate of damages, not only the actual value of the land taken by the intersecting road, and the damages from cutting the rails, but also the increased expense in operating the road so intersected. *Id.*

The commissioners have no power to change the place of crossing, to regulate the rate of speed thereat, or to review any fact upon which the order appointing them was based. *Matter of Central R. R. Co. of Long Island*, 1 T. & C. 419. But in *Matter of Lehigh Valley R. R.*, 93 N. Y. 639, it is held that the question as to the point at which one railroad shall intersect another may be tried before the commissioners, and is reviewable. Commissioners appointed to examine the proposed route have no power to determine the grade at which such route shall cross the track of another company; that is the province of commissioners appointed under this subdivision of section 28. *Matter of Application of N. Y., Lake Erie & W. R. R. Co.*, 99 N. Y. 388. It seems that a receiver of a railroad company has not the power without the order of the court to grant to another railroad the privilege of crossing the railroad he represents at a different grade. *Howlett v. N. Y., W. S. & B. R. R. Co.*, 14 Abb N. C. 328. Where a portion of the report of the commissioners was indefinite, it was set aside on that ground. *Matter of N. Y., L. & W. R. R. Co.*, 35 Hun, 232.

Appeals.—Where no objection was made to a petition and it was answered on the merits, it was held too late to raise the objection

that it was not properly verified in Court of Appeals; by omitting to object, the defect was waived, it not being jurisdictional. *Matter of Boston & Hoosac T. & W. R. R. Co.*, 79 N. Y. 64. The question of the point of crossing may be tried before the commissioners, and is the subject of review. *Matter of Lehigh Valley R. R. Co.*, 93 N. Y. 639. Where a report and order prescribed the terms and conditions of the crossing and determined the entire controversy, giving benefits to one of the companies, such company could not appeal from a portion of the report, so long as the benefits of the remainder thereof were retained. *Matter of N. Y., L. & W. R. R. Co.*, 44 Hun, 275.

Precedent for Petition.

In the Matter of Proceedings by the
Boston, Hoosac Tunnel and Western
Railway Company to acquire certain
crossings of the railroad of the Troy
and Boston Railroad Company.

To the Honorable, the Supreme Court of the State of New York :

The petition of the Boston, Hoosac Tunnel and Western Railway Company respectfully shows to this court that your petitioner is a corporation duly formed, organized, and incorporated under and in pursuance of the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850, and the several acts amendatory thereof and supplemental thereto; that the articles of association of your petitioner, as such corporation, were duly filed in the office of the secretary of State on the 16th day of February, in the year 1877; that said company was formed for the purpose of constructing, maintaining, and operating a railroad for public use in the conveyance of persons and property from the Troy and Greenfield railroad, and from the eastern boundary line of the State of New York, in the county of Rensselaer, thence to Lake Ontario, and was to be of the length of one hundred and fifty-six miles.

That your petitioner has caused the line of route of the said proposed railway, by said articles of association, to be constructed, to be surveyed, and maps, profiles and surveys thereof, to be made by, and on which said route or line is designated, and that it has located its said road according to such survey, and has duly filed in the office of each and every of the clerks of the said counties, severally, through or into which their said road is to be constructed, certificates of such location, signed by a majority of the directors of said company, and has also duly made maps and profiles of the routes intended to be adopted by said company, in the county of Rensselaer, duly certified by the president and chief engineer of said company, and duly filed the same in the office of the clerk of said county of Rensselaer, and the following certificates show the respective dates of filing the same.

That it is the intention of your petitioner, in good faith, to con-

struct, finish, and maintain a railroad from said Troy and Greenfield road, and from the eastern boundary line of the State of New York, through parts of the counties of Rensselaer, Washington, Saratoga and Schenectady, to the western terminus of their said road, and that the distance between said east line aforesaid, of the said State of New York, and the said western terminus of their said road proposed to be constructed by your petitioners, is not more than one hundred and fifty-six miles. That at least \$10,000 for every mile of said railroad proposed to be constructed by your petitioners, as aforesaid, has been in good faith subscribed to its capital stock, and at least ten per cent thereof actually paid in cash thereon.

That the lands, crossings and intersections hereinafter described, of the railway of your petitioners, of and with the railroad of the Troy and Boston Railroad Company, located in the county of Rensselaer, are required for the purpose of constructing and operating said proposed railroad, and are embraced within the said profiles, maps and surveys thereof, and said route through the county of Rensselaer, and said crossings and intersections are correctly delineated upon the maps hereinbefore referred to, and the profiles accompanying the same so filed as aforesaid, and that more than fifteen days have elapsed since service of notice of the location of your petitioner's railway over said lands and over and under said road was severally served on the occupants of all the lands and railroad hereinafter described, for said lands, crossings and intersections, including the said Troy and Boston Railroad Company; and that no application was made by any person or party served within said time to change such location. (Here insert description and map.)

The width proposed to be taken for the above crossing and intersection is twenty-six feet, or thirteen feet in the clear on each side of the center line above described, under the tracks of, and through the right of way of the said Troy and Boston Railroad Company, with such additional width as may be necessary to construct the masonry of the crossing, as well under said tracks as through the right of way of said company. The said land, crossing, and intersection proposed to be taken are described in the diagram annexed. And in pursuance of the statute, the said petitioners offer for the lands aforesaid, or the use thereof, and for the purposes aforesaid, and for said crossings and intersections aforesaid, the sum of \$500.

And your petitioner further shows on information and belief that it has been unable to acquire the crossings and intersections aforesaid, or the lands required therefor, or the use thereof for the same from the said Troy and Boston Railroad Company; that the said Troy and Boston Railroad Company has refused to allow the taking or use of said lands therefor, or to unite with your petitioner in forming such intersections or crossings, or grant the necessary facilities therefor, or agree with your petitioner upon the amount of compensation to be made therefor, or on the points and manner, of such crossings, or agree with it, or any, or either of said matters; that your petitioner has in good faith applied to said Troy and Boston Railroad Company for said crossings and intersections, and the land or use thereof required therefor, and endeavored to agree on the compensation to be made therefor, and on the points and manner of such crossings and intersections, and that an agreement thereon and therefor cannot be

obtained with, and has been refused by said Troy and Boston Railroad Company.

And your petitioner further shows that it is the intention of your petitioner to cross and intersect its railway with the railroad constructed and in operation upon, and at the place aforesaid by the said Troy and Boston Railroad Company, and construct the necessary conveniences and facilities in furtherance of such crossings and intersections; that it has in good faith applied to the said Troy and Boston Railroad Company to unite with your petitioner in such crossings and intersections, and to grant the facilities requisite and necessary therefor, and that your petitioner and the Troy and Boston Railroad Company cannot agree upon the amount of compensation to be made therefor, or on the points and manner of such crossings and intersections, or either of them; that it has in good faith endeavored to agree on such compensation, and the points and manner of such crossings and intersections with the said Troy and Boston Railroad Company, and thereby obtain said land, crossing and intersections, and has not been able to do so by means of the disagreement aforesaid, and the refusal of said company to agree thereon and thereto.

And your petitioner further states on information and belief that the names and places of residence of the only persons or corporations who own, or have, or claim to own or have any estate or interest in said lands covered by, or necessary for said crossings or intersections, is the Troy and Boston Railroad Company, whose principal office and place of business is in the city of Troy in said county.

And your petitioner, with a view of acquiring the right to construct, maintain and operate said crossing and intersections with the lands necessary and requisite therefor, prays for the appointment of three disinterested persons who reside in said county of Rensselaer, or in a county adjoining, to ascertain and determine the points and manner of such crossings and intersections, and the compensation to be made to the said Troy and Boston Railroad Company on the taking thereof, and of the lands necessary therefor, or the use thereof as aforesaid, pursuant to the provisions of the said act, and for such further or other order in the premises as the said court may deem proper to grant.

BOSTON, HOOSAC TUNNEL AND WESTERN RAILROAD Co.,

By E. W. PAIGE, its Attorney.

(Add verification by officer of company.)

Form for Notice.

(Title as in petition in full.)

To the Troy and Boston Railroad Company :

You will take notice that the foregoing petition will be presented to the Supreme Court, at a Special Term thereof to be held at the Supreme Court Chambers, in the City Hall, in the city of Albany, on the 22d day of March instant, at the opening of the court on that day at ten o'clock, A. M., or as soon thereafter as counsel can be heard, and that a motion will then and there be made that the prayer of such petition be granted.

Dated SALEM, WASHINGTON Co., N. Y., March 7, 1879.

E. W. PAIGE,

Att'y for Boston, Hoosac Tunnel & Western Railroad Company.

*Precedent for Order.**(Caption usual form.)**(Title as above.)*

On reading and filing the petition duly verified of the above-named the Boston, Hoosac Tunnel and Western Railroad Company, praying for the appointment of three disinterested persons residing in the county of Rensselaer, or in a county adjoining, as commissioners to ascertain and determine the points and manner of the crossing and intersections hereinafter described, and the compensation to be made to the said Troy and Boston Railroad Company on the taking thereof, and of the lands necessary for the use thereof, situated in the town of Hoosick, in said county of Rensselaer, and hereinafter more particularly described, and stating among other things that said crossings and intersections are required for the purpose of its incorporation, and that it has not been able to acquire the same, and the reason of such inability being therein stated. And upon reading and filing due proof of service of a copy of said petition with notice appended thereto, directed to the said Troy and Boston Railroad Company more than ten days since, that an application would be made to this court for an order granting the prayer of such petition, or for such other further relief as to the court should seem meet: Now, on motion of Mr. E. W. Paige, of counsel for said railroad company, after hearing Mr. Esek Cowen for said Troy and Boston Railroad Company, and after duly hearing and considering the proofs and allegations thereon made, including the maps filed by the petitioners in Rensselaer county clerk's office and described in the petition, and it appearing to the court that no sufficient cause is shown against granting the prayer of said petition; it is

Ordered, that Henry R. Pierson, Charles Hilton and Selden E. Marvin, all of the city of Albany, be and they hereby are appointed commissioners to ascertain and determine the points and manner of the crossings and intersections hereinafter described, and the compensation to be made to the said Troy and Boston Railroad Company on the taking thereof and of the lands necessary therefor, or for the maintenance, use and protection of the petitioner's railway at such crossings and intersections, with that of said respondents' company at said points in said town of Hoosick, in the county of Rensselaer, for the purposes of said company, and said commissioners are hereby vested with all the powers and charged with all the duties specified in the statute in such case made and provided, or necessary or required to execute this order. And it is further

Ordered, That the first meeting of said commissioners be held at the court-house in the city of Troy, in said county of Rensselaer, on the 1st day of July, 1879, at ten o'clock, A. M. (Here insert description and map.)

This order is without prejudice to the right of the Troy and Boston Railroad Company to raise any objection on the coming in of the report to the right to cross, which could have been raised preliminary to the granting of this order.

Enter in Rensselaer county.

T. R. WESTBROOK.

CHAPTER XXVIII.

GENERAL PROVISIONS RELATING TO SPECIAL PROCEEDINGS.

The following provisions of the Code, scattered through the various chapters and titles, are here grouped for convenience of reference in the order in which they appear therein, with other matters. In some instances only the section is designated, without being quoted; in others the section is given in full. As to power and jurisdiction of County Courts and Superior City Courts in special proceedings, see Code of Civil Procedure, § 340, subd. 4; § 263, subd. 9. As to powers of Supreme Court, see § 217.

§ 25. [*Amended, 1877.*] *No discontinuance by reason of vacancy, etc.*—An action or special proceeding, civil or criminal, in a court of record is not discontinued by a vacancy or change in the judges of the court, or by the re-election or reappointment of a judge; but it must be continued, heard and determined by the court as constituted at the time of the hearing or determination. After a judge is out of office he may settle a case or exceptions, or make any return of proceedings had before him while he was in office, and may be compelled so to do by the court in which the action or special proceeding is pending.

The trial of an action was commenced before Mr. Justice Pratt on October 7, 1877, and continued until January 26, 1878, testimony being taken at various intermediate dates. The term of office of Mr. Justice Pratt expired December 31, 1877, but having been re-elected he commenced a new term January 31, 1878. No objection was made to proceeding with the trial by any of the parties at the time. *Held*, that no objection to the regularity of the proceedings could be raised after judgment therein. *Kelly v. Christal*, 16 Hun, 242; affirmed, without passing on this point, 81 N. Y. 619.

§ 26. *In New York one judge may continue proceedings begun before another.*—In the city and county of New York, a special proceeding instituted before a judge of a court of record, or a proceeding commenced before a judge of the court, out of court, in an action or special proceeding pending in a court of record, may be continued from time to time before one or more other judges of the same court, with like effect as if it had been instituted or commenced before the judge who last hears the same.

It was held, of a similar provision under the old Code, in Superior Court, that proceeding commenced in the first judicial district by any judge competent to institute it therein, might be continued in such district before any other judge competent to have commenced it. *Dresser v. Van Pelt*, 15 How. 19; S. C., 6 Duer, 687.

The application of a sheriff to fix the fees in an attachment case is a continuation of the attachment proceeding, and the hearing

could, in New York city, be had before a judge other than the one who issued the attachment, by virtue of this provision. *Woodruff v. Imperial Fire Insurance Co.*, 90 N. Y. 521.

§ 87. *Trials elsewhere than at court-house.*—The parties to an action or special proceeding pending in a court of record may, with the consent of the judge who is to try or hear it, without a jury, stipulate in writing that it shall be tried or heard and determined elsewhere than at the court-house. The stipulation must specify the place of trial or hearing, and must be filed in the office of the clerk; and the trial or hearing must be brought on upon the usual notice, unless otherwise provided in the stipulation.

Contested motions requiring notice cannot be heard at a Special Term adjourned by the justice holding it to his chambers, unless by consent of all the parties. The section is a substitute for section 41, chapter 470, Laws of 1847. *Matter of Wadley*, 29 Hun, 12.

§ 44. *Process and proceedings remain valid.*—When a term of court fails or is adjourned, or the time or place of holding the same is changed, as prescribed in this chapter, an action, special proceeding, writ, process, recognizance, or other proceeding, civil or criminal, returnable or to be heard or tried at that term, is not abated, discontinued, or rendered void thereby; but all persons are bound to appear, and all proceedings must be had at the time and place to which the term is adjourned or changed, or, if it fails, at the next term, with like effect as if the term was held as originally appointed.

The language of this section is construed in *People v. Swales*, 33 Hun, 208.

§ 52. *Substitution of an officer in a special proceeding.*—In case of the death, sickness, resignation, removal from office, absence from the county, or other disability of an officer before whom a special proceeding has been instituted, where no express provision is made by law for the continuance thereof, it may be continued before the officer's successor or any other officer residing in the same county before whom it might have been originally instituted; or, if there is no such officer in the same county, before an officer in an adjoining county who would originally have had jurisdiction of the subject-matter if it had occurred or existed in the latter county.

See *Gamman v. Berry*, 34 Hun, 138.

§ 53. *Proceedings before substituted officer.*—At the time and place specified in a notice or order for a party to appear, or for any other proceeding to be taken, or at the time and place specified in the notice to be given, as prescribed in this section, the officer substituted as prescribed in the last section, or in any other provision of law, to continue a special proceeding instituted before another, may act with respect to the special proceeding, as if it had been originally instituted before him. But a proceeding shall not be taken before a substituted officer, at a time or place other than that specified in the original notice or order until notice of the substitution, and of the time and place appointed for the proceeding to be taken, has been given, either by personal service or by publication, in such manner and for such time as the substituted officer directs, to each party who may be effected [affected] thereby, and who has not appeared before either officer. Where, after a hearing has been commenced, it is adjourned to the next judicial

day, each day to which it is so adjourned, is regarded, for the purposes of this section, as the day specified in the original notice or order, or in the notice to appear before the substituted officer, as the case requires.

§ 268. *Jurisdiction in special proceedings out of court.* — Each judge of a superior city court also possesses the same power and authority, in a special proceeding, which can be lawfully instituted before him, out of court, which a justice of the Supreme Court possesses in a like special proceeding, instituted before him in like manner.

§ 293. *Jurisdiction in special proceedings in city of Buffalo.* — The court also possesses and exercises, within the city of Buffalo, in any matter which arises, or the subject whereof is located or situated within that city, jurisdiction, power and authority, concurrent and co-extensive with those conferred upon the Supreme Court, in a like case, by any statutory provision.

See, also, section 292, subd. 4, as to jurisdiction in proceedings against city of Buffalo.

§ 342. [Amended, 1877.] *Proceedings if county judge disqualified or incapable of acting.* — If the county judge is, for any cause, incapable to act in an action or special proceeding, pending in the County Court, or before him, he must make, and file in the office of the clerk, a certificate of the fact; and thereupon the special county judge, if any, and if not disqualified, must act as county judge in that action or special proceeding. Upon the filing of the certificate, where there is no special county judge, or the special county judge is disqualified, the action or special proceeding is removed to the Supreme Court, if it is then pending in the County Court; if it is pending before the county judge, it may be continued before any justice of the Supreme Court within the same judicial district. The Supreme Court, upon the application of either party, made upon notice, and upon proof that the county judge is incapable to act in an action or special proceeding pending in the County Court, may, and if the special county judge is also incapable to act, must, make an order removing it to the Supreme Court. Thereupon the subsequent proceedings in the Supreme Court must be the same as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken, which might have been taken in the County Court.

Where a special proceeding is pending before a county court, the county judge whereof is disqualified from acting, he cannot make an order directing it to be heard before a justice of the Supreme Court, but should make and file with the county clerk a certificate of disqualification. A proceeding pending in a County Court cannot be continued before a justice of the Supreme Court, but must be removed into the Supreme Court. *Matter of Village of Rhinebeck*, 19 Hun, 346. It was held before the Code that where a county judge was interested, he might request another county judge to hold the court. *Matter of Ryers*, 10 Hun, 93. The language of this section seems to be mandatory.

§ 348. *Powers of County Court and judge.* — Where a County Court has jurisdiction of an action or a special proceeding, it possesses the same jurisdiction, power and authority in and over the same, and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any

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judgment, or grant either party any relief, which the Supreme Court might render or grant in a like case, and may enforce its mandates in like manner as the Supreme Court. And the county judge possesses the same power and authority, in the action or special proceeding, which a justice of the Supreme Court possesses, in a like action or special proceeding, brought in the Supreme Court.

§ 414. *Cases to which Statute of Limitations applies.*—The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases:

1. A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.

2. A cause of action or a defense which accrued before the first day of July, eighteen hundred and forty-eight. The statutes then in force govern, with respect to such a cause of action or defense.

3. A case, not included in the last subdivision, in which a person is entitled, when this act takes effect, to commence an action, or to institute a special proceeding, or to take any proceeding therein, or to pursue a remedy upon a judgment, where he commences, institutes, or otherwise resorts to the same, before the expiration of two years after this act takes effect; in either of which cases the provisions of law applicable thereto, immediately before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof.

4. A case, where the time to commence an action has expired, when this act takes effect.

The word "action," contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action.

§ 433. *Provisions as to service of summons apply to special proceedings.*—The provisions of this article, relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provisions for the service thereof is otherwise made by law.

§ 716. *Certain receivers may hold real property.*—A receiver, appointed by or pursuant to an order or a judgment, in an action in the Supreme Court, a Superior City Court, or a County Court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

§ 815. *Undertaking, etc., not affected by change of parties.*—A bond or undertaking, given in an action or special proceeding, as prescribed in this act, continues in force, after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and effect, as if then given anew, in conformity to the change of parties.

§ 825. *Filing papers in special proceedings.*—A return or other paper in a special proceeding, where no other disposition thereof is prescribed by law, must be filed, and an order therein must be entered, with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the Supreme Court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides.

§ 860. *Witness exempt from arrest.*—A person duly and in good faith subpoenaed or ordered to attend, for the purpose of being examined, in a case where

his attendance may lawfully be enforced by attachment or by commitment, is privileged from arrest in a civil action or special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.

A resident of another county attending in New York city as a witness may be served with a summons where the court has jurisdiction of the cause of action if service were made out of the city. *Sheldon v. Wakely*, 3 Law Bull. 94.

But the general rule is that a party attending as a witness is exempt from service of process. *Perm v. Randall*, 3 Law Bull. 61. The rule does not, however, apply to a resident witness as to process, although it does as to arrest as to non-residents; they are exempt from both. *Frisbie v. Young*, 11 Hun, 474.

§ 867. [Amended, 1877 and 1879.] *Production, etc., of books of account.* — A person shall not be compelled to produce, upon a trial or hearing, a book of account otherwise than by an order requiring him to produce it, or a subpoena *duces tecum*. Such subpoena must be served at least five days before the day when he is required to attend. At any time after service of such a subpoena, or order, the witness may obtain upon such a notice as the judge, referee, or other officer prescribes, an order relieving him wholly or partly from the obligations imposed upon him by the subpoena, or the order for production, upon such terms as justice requires, touching the inspection of the book, or any portion thereof, or taking a copy thereof, or extracts therefrom, or otherwise. An order may be made, as prescribed in this section, by a judge of the court, or in a special proceeding pending out of court before an officer, by the officer, or, in either case, by a referee duly appointed in the cause, and authorized to hear testimony. A justice of the peace, or other judge of a court not of record, may make such an order in an action brought in his court, at any time after the commencement thereof.

In case of an oppressive order it is said that application for relief should be made rather to the court which made the order than to the appellate court. *In re Estate of Kelly*, 11 Week. Dig. 308. Sections 1195 to 1199 refer to penalties for non-attendance of jurors, the manner in which jurors should be kept, and fines for delinquencies in special proceedings.

§ 1356. [Amended, 1877.] *Appeal from order made in the same court.* — An appeal may be taken, to the General Term of the Supreme Court, or of a superior city court, from an order, affecting a substantial right, made in a special proceeding, at a special term or a trial term of the same court, or, in the Supreme Court, at a term of a circuit court; or made by a judge of the same court, in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before him.

This section regulates appeals in special proceedings. *Dickerman v. Dickerman*, 34 Hun, 585, including appeals from references of disputed claims by order of the surrogate. *De Nise v. De Nise*, 41 Hun, 9. Also proceedings to punish as for a contempt which is

appealable to the Court of Appeals. *People, ex rel. Negus, v. Dwyer*, 90 N. Y. 402. An appeal from an order confirming the report of arbitrators and from the judgment entered thereon must be heard upon the same papers as were before the court at the time when the order was made and the judgment directed from which the appeal was taken. A case forms no part of the papers, and none can regularly be proposed or served in any proceeding taken to make or review an application concerning an award. The proceeding prescribed by the Code for vacating or modifying or correcting an award is a motion, and the papers on which it is founded must accompany the notice of motion, and from the order made thereon an appeal may be taken and heard on the same papers upon which appeal from orders are heard in other cases. *Matter of Poole v. Johnson*, 32 Hun, 216. Such an order can only be reviewed on appeal. *Matter of Livingston*, 32 How. 20; 34 N. Y. 555. When, in special proceedings in courts, or before officers of limited jurisdiction, they are required to ascertain a particular fact in such proceedings, having particular qualifications, or occupying some peculiar relations to the parties or subject-matter, such acts, when done, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose, and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be. *Porter v. Purdy*, 29 N. Y. 106.

It seems that the distinction between proceedings instituted at Special Term, and those instituted at chambers is disregarded in the Code of Civil Procedure by this and the succeeding section. *Matter of Jetter*, 78 N. Y. 601.

§ 1357. [Amended, 1877.] *Appeal from an order when made by another court or judge.*—An appeal may also be taken to the Supreme Court, from an order, affecting a substantial right, made by a court of record, possessing original jurisdiction, or a judge thereof, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before, the judge who made the final order. But this section does not apply to a case, where an appeal from the order, to a court, other than the Supreme Court, is expressly given by statute.

An order of a county judge directing a further assessment to be made in proceedings instituted for the drainage of swamps, as provided by chapter 608 of Laws of 1881, is final and conclusive, and no appeal lies therefrom under this section to the General Term, either on questions of law or fact. *Matter of Swan*, 33 Hun, 201. But an order made by a county judge upon an application for the

refunding of a tax illegally or improperly assessed, or levied, is an order made in a special proceeding, and as such reviewable upon appeal to the General Term under this section. *Matter of Harris v. Supervisors of Niagara*, 33 Hun, 279. This section has no longer any application to bastardy proceedings since the Code of Criminal Procedure, and they must be reviewed by *certiorari* as thereby provided. *People v. Carney*, 29 Hun, 47. Proceedings for contempt may be reviewed. *Negus v. Dwyer*, 90 N. Y. 402. If respondents in a Surrogate's Court desire a review, they should secure a return by the surrogate of all the facts and evidence upon which the claim was allowed. So held under old Code. *Hannahs v. Hannahs*, 5 Hun, 644. It was said in *Matter of Kings Bridge Road*, 5 Hun, 146, that an appeal from an order of the Special Term, confirming the report of commissioners of estimate and assessment, brings up for review only those questions which were discussed below. See, also, *Haviland v. White*, 7 How. 154. But in *Matter of Petition of Livingston*, 34 N. Y. 555, it is held that on an appeal from an order in a special proceeding, it is in the power of the court to examine the whole proceeding, and the language of the section, as it now stands, is in accordance with that decision.

§ 1358. [Amended, 1877.] *Preceding order may be reviewed.*—An appeal, authorized by this title, brings up for review, any preceding order, made in the course of the special proceeding, involving the merits, and necessarily affecting the final order appealed from, which is specified in the notice of appeal.

That an intermediate order can be brought up for review. See *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. (N. S.) 190.

§ 1359. *Limitation of time to appeal.*—An appeal, authorized by this title, must be taken within thirty days after service of a copy of the final order, from which it is taken, with a written notice of the entry thereof, upon the appellant; or, if he appeared, upon the hearing, by an attorney at law or an attorney in fact, upon the person who so appeared for him.

§ 1360. *Stay; hearing of appeal; decision thereon.*—The provision of title fourth of this chapter, relating to perfecting an appeal from an order, taken as therein prescribed; to staying the execution of the order appealed from; to hearing the appeal; and to the entry and enforcement of the order made upon the appeal, apply, where an appeal is taken, as prescribed in this title, except as otherwise specially prescribed by law.

The stay can only be by order, and if security is required, the provisions of title 2, chapter 12, apply. *Ryan v. Webb*, 39 Hun, 436. It was held before the present Code that the intention of the legislature was to assimilate appeals in special proceedings to those from judgments. *Rochester Water Works v. Wood*, 60 Barb. 137; *Matter of Anderson*, 60 N. Y. 457.

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§ 1688. *When special proceeding not allowable.*—A special proceeding to recover real property cannot be taken, except in a case specially prescribed by law.

§ 1777. *Misnomer of corporation.*—In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf.

The rule previous to the Code was that in a suit by a corporation the defendant could take advantage of the misnomer of the plaintiff only by plea in abatement, and by pleading, the misnomer may be waived. *Trustees of the Society of Little Falls v. Tryon*, 1 Den. 451. The same rule was held in *Whittlesey v. Frantz*, 74 N. Y. 456.

§ 1814. *Action by or against executors, etc., to be in representative capacity.*—An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein.

§ 1900. *Maliciously suing, etc., in another's name.*—If a person, vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court, of record or not of record, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court, or before such an officer, either before or after judgment or other final determination; an action, to recover damages therefor, may be maintained against him, by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment, not exceeding six months.

§ 2517. *What commencement of proceedings within statute of limitations.*—The presentation of a petition is deemed the commencement of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section, a citation, issued upon the presentation of the petition, must, within sixty days thereafter, be served, as prescribed in section two thousand five hundred and twenty of this act, upon the adverse party, or upon one of two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made, pursuant to an order made as prescribed in section two thousand five hundred and twenty-two of this act.

While technically the procedure in a Surrogate's Court is defined as a special proceeding, no attempt has been made to treat it in this work, since the subject demands a volume for treatment, and is ably discussed and methods of procedure pointed out, and authori-

ties collated in numerous works devoted to the subject. By sections 2672 and 2675, a temporary administrator is given power to maintain and defend an action or special proceeding.

§ 2861. *Jurisdiction must be specially conferred.*—A justice of the peace has such jurisdiction in civil actions and special proceedings, as is specially conferred upon him by statute, and no other.

§ 2868. *Justice to hold courts; general powers.*—A justice of the peace must hold, within his town or city, a court for the trial of any action or special proceeding, of which he has jurisdiction, brought before him. He must hear, try, and determine the same, according to law and equity; and for that purpose, where special provision is not otherwise made by law, the court is vested with all the necessary powers possessed by the Supreme Court.

A justice of the peace has also jurisdiction relating to animals straying on the highway, which is termed a special proceeding. Sections 3082–3115.

§ 3150. *Transfer of action on expiration of term.*—If the term of office of a justice of the peace is about to expire, or he is about to remove from the town or city, before judgment is rendered in an action, or a final order is made in a special proceeding, pending before him, he must previously make a written order, reciting the fact, and directing the action or special proceeding to be continued before another justice of the same town or city, named in the order.

§ 3152. *Proceeding upon transfer of action.*—Where an order is made, as prescribed in either of the last two sections, the constable must forthwith take it, and all other papers in the action, with the body of the defendant, if he is under arrest, before the justice named in the order. The plaintiff or petitioner must forthwith appear before that justice, who must take cognizance of the action or special proceeding, and must proceed therein as if it had been commenced before him. Costs, recovered in the action or special proceeding, include the fees allowed by law, for services performed by the constable and the justice, before the transfer, together with the fees allowed by law, for the proceedings before the justice to whom the cause is transferred.

§ 3197. *Certain pending actions transferred.*—Every civil action, now pending in either of those courts, other than an action specified in the last section, is hereby transferred to the Supreme Court; and the subsequent proceedings therein, before and after the judgment, must be the same, as if the action had been commenced in the Supreme Court.

§ 3240. [Amended, 1881.] *Costs in special proceedings.*—Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.

The allowance of costs in special proceedings rests in the discretion of the court, except when the right to them is expressly given by statute. *Matter of Potter*, 8 State Rep. 261. Costs in special proceedings are in the discretion of the tribunal hearing and deciding the case. If allowed, they must be at the rate allowed for simi-

lar proceedings in civil actions. *People v. Fire Commissioners*, 5 Abb. N. C. 144; *Matter of Protestant Episcopal School*, 86 N. Y. 396; 24 Hun, 367. But no costs are allowable in proceedings for a criminal contempt. *People v. Gilmore*, 88 N. Y. 626. A court has no power to grant allowances in special proceedings; it can only allow costs at the rates allowed for similar services in an action brought in the same court, and in like manner. *Matter of Simpson*, 26 Hun, 459. In proceedings to punish for a contempt, where the party acted in good faith and in accordance with what he believed to be his duty, only motion fees and disbursements can be taxed as costs. *People v. Cooper*, 20 Hun, 486.

Where proceedings are instituted by a railroad company under the laws of this State, and after report by commissioners making their award, and before confirmation, the railroad moves for leave to discontinue and abandon the proceedings, it is within the legitimate power of the court in granting it to annex such terms to go with the favor, as under the circumstances, justice and fairness to the parties require. The terms upon which the motion should be granted are within the discretion of the court. While the provisions of the statute relating to extra allowances do not apply to special proceedings, and such an allowance cannot be made under an order giving costs, but in such cases the limitations "for similar services, as in actions," controls, yet that restriction has no application on a motion for favor. The court in granting such a motion is not restricted to costs and disbursements as a condition. *N. Y., W. S. & B. R. R. Co. v. Thorne*, 1 How. (N. S.) 190. A proceeding under the General Railroad Act is a special proceeding, but is more analogous in its purpose and scope to an action than to a motion, and the court is justified in allowing full costs as in an action. *Matter of Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145. The general rule is, that in proceedings to acquire land under the General Railroad Act, costs are to be awarded under the provisions of this section, it being a special proceeding. *Matter of Lackawanna, etc., R. R. Co.*, 26 Hun, 592. Where commissioners were appointed without opposition, and a hearing had at which witnesses subpoenaed by the land-owner were sworn and examined as to the value of the land, it was held there was no issue made, and as no question of fact had been raised or tried, no trial fee should be allowed. Where an order confirming a referee's report on reference out of Surrogate's Court, directed that defendant have judgment for costs and disbursements as in an action, it is not error for the clerk to tax costs

as in an action. The court has power to award costs "as in actions brought in the same court." *Hearn v. Sullivan*, 13 Abb. N. C. 371.

It was held in *Matter of Durham*, 49 Super. Ct. 487, that the Code leaves the question of awarding or denying costs in special proceedings to the discretion of the court. The discretion contemplated by the law is not a mere unreflecting caprice, exercised in violation of right, but a judicial discretion to be used according to the rules of a court of equity. Proceedings taken by creditors and others under the Assignment Acts are special proceedings (citing sections 3333, 3334, 3343, sub. 20), and costs may be allowed in them as in a special proceeding. *Matter of Thorn*, 10 Daly, 71. Where, upon an appeal from the decision of a surrogate, denying a petition to compel the payment of legacies, on the ground that the claim is barred by the statute of limitations, the General Term affirms the judgment, it may, under this section, allow costs at the same rates allowed for similar services in an action brought in the same court in the same manner. *Cole v. Terpenning*, 27 Hun, 111. But on an appeal from an order dismissing a petition and citation requiring the respondents to show cause why they should not file an inventory, costs were allowed of a motion, as in similar proceedings in the Supreme Court. *Walsh v. Van Allen*, 36 Hun, 629. Where an order of a surrogate granting leave to issue execution on a judgment after the death of the judgment debtor is affirmed with costs at General Term, the successful party is entitled to enter and docket a judgment of affirmance establishing the surrogate's decree and awarding costs as in an action for similar services, and to issue execution thereon. *Wadley v. Davis*, 38 Hun, 186.

The fact that a matter is a special proceeding does not prevent the allowance of necessary expenditures as disbursements. *Matter of Department of Public Parks*, 27 Hun, 305. Upon the coming in of a referee's report dismissing the petition of a third person praying that a judgment of divorce be vacated, and awarding to plaintiff \$350 as compensation for disbursements and counsel fees, to be paid by the petitioner, it was held that, in so far as the order awarded the said compensation to the plaintiff, such compensation being neither the costs of a motion, nor costs of a special proceeding, but being a gross sum allowed as compensation for disbursements and counsel fees in the proceeding, it should be reversed. *Simmons v. Simmons*, 32 Hun, 551. This section does not regulate the costs in summary proceedings to recover the possession of land before a justice of the peace on reversal by the County Court. Sections 2260 and 3066

granting costs, as of course, are applicable. *Harrison v. Swart*, 34 Hun, 259. The costs on reversal of an order directing a commitment for contempt in supplementary proceedings are but \$10 and disbursements. *Jones v. Sherman*, 8 State Rep. 344.

In proceedings instituted under chapter 338, Laws of 1858, where the Special Term vacated the assessment with costs to the applicant, from which order no appeal was taken, and costs were stricken out by the General Term, on appeal from an order of the Special Term denying an order to strike out, it was held that the applicant was entitled to costs at the rate allowed for similar services in actions, and the order of the General Term reversed. *Matter of Jetter*, 78 N. Y. 601. Costs are allowable on an application to enforce the liability imposed by the statute, declaring the assignee of a cause of action, or one beneficially interested in the recovery, liable for the costs of an action brought by him in the name of another, as in a special proceeding. *Marvin v. Marvin*, 78 N. Y. 541. Proceedings for the obtaining of surplus moneys arising from statutory foreclosure of mortgage is a special proceeding, and the costs allowed should be necessary disbursements and motion costs. *Matter of Gibbs*, 58 How. 502. In *Elwell v. Robbins*, 43 id. 108, it was held that two motion fees might be allowed in such proceedings, one on appointment of referee, the other on confirmation of the report. That only disbursements and motion costs are allowable, is held in *Welington v. Ulster Ice Co.*, 5 Week. Dig. 104; *Helrauk v. Colwell*, 2 Law Bull. 39, and *McDermott v. Hennessy*, 9 Hun, 59. Costs may be allowed on *habeas corpus* under this section, although they will not be granted if reasonable cause for the writ exists, but when on *habeas corpus* for an infant a reference is ordered, witnesses are examined, and a decision rendered upon a hearing, costs will be allowed in the discretion of the court. *Matter of Barnett*, 11 Hun, 468. Where relator was arrested upon an execution, and the arrest was questioned on *habeas corpus*, it was held that only costs for proceedings after petition, and for trial and the disbursements could be taxed. *Muller v. Bowe*, 4 Law Bull. 10. Under the former Code costs were allowed on summary proceedings to compel a party to support a relative when brought by *certiorari* from the Court of Sessions to the Supreme Court for review. *Haviland v. White*, 7 How. 154. The following decisions were made, also, under the old Code as to costs on *certiorari*. In *People v. McDonald*, 69 N. Y. 362; *People v. Board of Police*, 39 id. 506. *People v. Village of Nelliston*, 79 id. 638, it is held costs are not allowable on a common-

law *certiorari*. In *People v. Van Alstyne*, 3 Keyes, 35 (1866), it is said: "There was formerly some diversity of opinion as to the authority of the courts to award costs on appeals to the prevailing party on a common-law *certiorari*. We have held that these cases belong to the class of special proceedings, embraced in the third section of the Code, and that such costs may be awarded in the appellate tribunal," citing *People v. Wheeler*, 21 N. Y. 86; *People v. Stilwell*, 19 id. 532; *People v. Commissioners of Schodack*, 27 How. 158; *People v. Flake*, 14 id. 527. In *People v. Commissioners of Taxes and Assessments*, 76 N. Y. 64 (1879), it is said, as to the questions of costs on a common-law *certiorari*, there is a lamentable conflict of authority, but it has been settled in this court, as announced in *People v. McDonald*, 69 N. Y. 362, which holds costs are not allowable on a common-law *certiorari*. In *People v. Village of Nelliston*, 79 N. Y. 638, *supra* (1879), it is said, *per curiam*: "We have carefully considered the question of costs, and are of the opinion that the respondents should not have costs; their allowance was not in conformity with our actual decision. The costs on appeal here claimed were in a *certiorari* proceeding, and it matters not in what form the proceeding came before us, whether upon appeal from a judgment or from an order superseding the writ. As we have repeatedly decided, the costs are not allowable. In *People v. Smith*, 13 Hun, 227 (1878), the Supreme Court held the award of costs to be discretionary with the court, reviewing the cases then decided in the Court of Appeals. In *People v. Smith*, 24 Hun, 66, motion costs were allowed at General Term without question or discussion. But the question seems to be put at rest in *People, ex rel. Smith, v. Asten*, 101 N. Y. 651; S. C., 1 State Rep. 37; where, on *certiorari* to review the action of assessors under chapter 269, Laws of 1880, which relieves them from costs below, except in case of bad faith, the Court of Appeals held that, on an appeal from such a determination which was heard and determined in like manner as an order, costs were to be given or withheld in the discretion of the court, and denied a motion to amend the remittitur by striking out the allowance of costs. Proceedings to compel an accounting by a special guardian appointed to sell an infant's real property constitute a special proceeding, and where a question of fact is referred, the referee's fees might, under the former statute, be allowed as costs. *Spelman v. Terry*, 74 N. Y. 448. The costs to be allowed and which are recoverable upon an appeal from an order granting a peremptory *mandamus*, where such order

is affirmed, are under § 3240, and in the discretion of the court, are the same costs which are given on an appeal from a judgment. *People, ex rel. Bray, v. Supervisors of Ulster*, 65 How. 327. Upon a peremptory *mandamus* being denied, no alternative writ having been granted, the costs are in the discretion of the court, and can only be granted at the same rate as on motion in a civil action. *People v. N. Y. Produce Exchange*, 64 How. 523.

On proceeding for discharge of debtor from imprisonment on execution, there can be no costs to respondent before notice, as the notice of the application is not only the institution of the proceedings, but the only notice of trial. He is entitled to costs after notice, and as the parties when in court are there for trial, a trial fee should be allowed whether the petition is dismissed for default in appearing to prosecute or upon the merits. *Matter of Davis*, 2 Law Bull. 96. A proceeding under the General Railroad Act by one railroad corporation to secure a crossing over the track of another railroad is a special proceeding, and the costs therein are in the discretion of the court. *Matter of Cortland, etc., Horse Railroad Company*, 98 N. Y. 336.

§ 3258. *When defendant entitled to double or increased costs.*—In either of the following cases, a defendant, in whose favor a final judgment is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a State writ, is entitled to recover the costs prescribed in section three thousand two hundred and fifty-one of this act, and, in addition thereto, one-half thereof:

1. Where the defendant is or was a public officer, appointed or elected under the authority of the State, or a person specially appointed, according to law, to perform the duties of such an officer; and the action or special proceeding was brought by reason of an act done by him by virtue of his office, or an alleged omission by him to do an act which it was his official duty to perform.

2. Where the action was brought against the defendant, by reason of an act done, by the command of such an officer or person, or in his aid or assistance, touching the duties of the office or appointment.

3. Where the action was brought against the defendant, for taking a distress, making a sale, or doing any other act, by or under color of authority of a statute of the State.

But this section does not apply, where an officer, or other person, specified herein, unites in his answer with a person not entitled to such additional costs.

§ 3259. *Increased disbursements not allowed.*—The increase, specified in the last section, does not extend to the disbursements; and an officer, witness, or juror, is not entitled to any other fee in the action, except the single fee allowed by law for his services.

§ 3279. *Title applies to special proceedings.*—The foregoing sections of this title apply to a special proceeding instituted in a court of record, in like manner as to an action; for which purpose, the prosecuting party, other than the people, or, where the special proceeding is instituted in the name of the people, upon there-

lation of a private corporation or individual, the relator, is deemed a plaintiff, and the adverse party a defendant.

In summary proceedings to recover the possession of real property a landlord being a non-resident, but owning property in the city and county of New York, cannot be required to file security for costs. The proceeding is not such a special proceeding instituted in a court of record as is contemplated by section 3279. It is a proceeding before a magistrate. *Hasler v. Johnston*, 59 How. 432.

§ 3316. *Jurors' fees in special proceedings.*—A trial juror, sworn in a special proceeding, before a judge of a court of record; or upon a writ of inquiry; or upon a trial, before a sheriff, of a claim to personal property, seized by virtue of a warrant of attachment or an execution; is entitled to twenty-five cents, to be paid by the person at whose instance the jury is impaneled.

§ 3334. *Definition of special proceedings.*—Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding.

§ 3343, subd. 20. *Rules of construction, etc.*—The word "action" refers to a civil action; the word "judgment" to a judgment in such an action; the term "special proceeding" to a civil special proceeding; the word "order" to an order made in such an action or special proceeding; the words "an action of ejectment" to an action to recover the immediate possession of real property.

The following are some of the numerous decisions holding what are, and what are not special proceedings; there are doubtless numerous others of same character, but it is difficult to collate them, as they are not to be found digested or collated under any single subject. The following are held to be special proceedings: An application for admission to practice as an attorney. *Matter of Cooper*, 22 N. Y. 67, more fully as *Matter of Graduates*, 11 Abb. 301. Application to assess damages under Plankroad and Turnpike Act. *In re Fort Plain and Cooperstown Plankroad Co.*, 3 Code R. 148. Proceedings to assess damages for a local improvement. *King v. Mayor of New York*, 36 N. Y. 182. Motion to set aside confession of judgment for defect in statement. *Belknap v. Waters*, 11 N. Y. 477. Petition to compel infant heirs to perform their ancestor's contract. *Hyatt v. Seeley*, 11 N. Y. 52. Proceedings to compel the support of poor relations. *Haviland v. White*, 7 How. 154. Appeal before referees in highway proceedings. *People v. Albright*, 23 id. 306; *Flake v. People*, 14 id. 527; contra, *People v. Heath*, 20 id. 304. See *People v. Strevell*, 15 Week. Dig. 88. Proceedings supplementary to execution. *Gould v. Chapin*, 4 How. 185; *Smith v. Tozer*, 3 State Rep. 164; *Jones v. Sherman*, 8 id. 344. Proceedings under the General Assignment Acts. *Matter of Thorn*, 10 Daly, 71; *Matter of Potter*, 8 State Rep. 261. Certiorari. *People v. Jacobs*, 5 Hun, 428; affirmed, 66 N. Y. 8; *Peo-*

ple v. Stilwell, 19 id. 531; *People v. Board of Commissioners of Taxes and Assessments*, 76 id. 64. A proceeding to vacate an assessment. *Matter of Manhattan Savings Institution*, 82 N. Y. 142; *Matter of Protestant Episcopal School*, 86 id. 396. But see *Matter of Jetter*, 78 id. 601. Mandamus. *People v. Supervisors of Richmond*, 28 N. Y. 112; *People v. Board of Supervisors*, 65 How. 327. Proceedings for contempt. *Holstein v. Rice*, 15 Abb. 307; *Gray v. Cook*, id. 308; *Woolf v. Jacobs*, 5 Hun, 428; *Erie Railway v. Rumsay*, 45 N. Y. 637; *Hart v. Johnson*, 7 State Rep. 133. But not for criminal contempt. *People v. Gilmour*, 88 N. Y. 626. Petition by creditor for leave to begin an action against a lunatic. *Williams v. Estate of Cameron*, 26 Barb. 172. Proceedings to change location of toll-gate. *McAllister v. Albion Plank-road Company*, 11 Barb. 611. Proceedings to condemn land for water purposes. *Matter of Waverly Water-Works*, 16 Hun, 57.

Proceedings to appraise lands for railroad purposes under the General Railroad Act. *In re N. Y. Central R. R. Co.*, 11 N. Y. 276; *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 id. 145; *Matter of N. Y., W. S. & B. R. R. Co.*, 34 Hun, 233; *A. & S. R. R. Co. v. Dayton*, 10 Abb. (N. S.) 182; *Matter of N. Y., Lackawanna & W. R. R. Co.*, 26 Hun, 592; *Matter of N. Y. & Harlem R. R. Co.*, 98 id. 12; *Matter of Cortland, etc., Horse R. R. Co.*, 98 N. Y. 336. See brief of counsel for respondent, page 339. Prohibition. *People v. Common Pleas*, 43 Barb. 278. Summary proceedings to recover possession of land. *People v. Boardman*, 4 Keyes, 59; Habeas corpus. *Matter of Barnett*, 11 Hun, 468. Reference to ascertain the rights of parties in surplus on statutory foreclosure. *Elwell v. Robins*, 43 How. 108; *Matter of Gibbs*, 58 id. 502; *Mutual Life Ins. Co. v. Anthony*, 23 Week. Dig. 427. A proceeding to procure the settlement of the accounts of a deceased trustee, and the appointment of a successor which is neither commenced or prosecuted by a summons and complaint. *Matter of Simpson*, 26 Hun, 459; *In re Livingston*, 34 N. Y. 555. A proceeding to compel a special guardian to account. *Spelman v. Terry*, 74 id. 448. A proceeding for the relief of imprisoned debtors. *In re Brady*, 69 id. 215. Reference of claim by executors and administrators without action under the statute. *Boyd v. Bigelow*, 14 How. 511; *Denise v. Denise*, 41 Hun, 9; *Roe v. Boyle*, 81 N. Y. 305; *Moury v. Peet*, 88 id. 453; *Hatch v. Stewart*, 5 State Rep. 180; *Hopkins v. Lott*, 6 id. 12; *Young v. Cuddy*, 23 Hun, 49; *Paddock v. Kirkham*, 102 N. Y. 597. A proceeding to remove a

guardian. *Matter of King*, 4 id. 570. The probate of a will. *Matter of Gates*, 26 Hun, 181. An application to enforce the liability imposed by statute, declaring an assignee of a cause of action, or one beneficially interested in the recovery, liable for the costs of an action. *Marvin v. Marvin*, 78 N. Y. 541. An application to compel a receiver to pay over moneys. *People v. Bank of Rochester*, 96 id. 32.

§ 8352. *Effect of this act on proceedings taken or rights accrued.* — Nothing contained in any provision of this act, other than in chapter fourth, renders ineffectual, or otherwise impairs, any proceeding in an action or a special proceeding, had or taken, pursuant to law, or any other lawful act done, or right, defense, or limitation, lawfully accrued or established, before the provision in question takes effect; unless the contrary is expressly declared in the provision in question. As far as it may be necessary, for the purpose of avoiding such a result, or carrying into effect such a proceeding or other act, or enforcing or protecting such a right, defense, or limitation, the statutes in force on the day before the provision takes effect, are deemed to remain in force, notwithstanding the repeal thereof.

This does not include costs, which will be granted or refused in accordance with the law in existence when the right to costs actually accrues. *Matter of Sexton*, 1 Dem. 3; *Garling v. Ladd*, 27 Hun, 112. The right to punish a husband for a contempt for failure to pay alimony is not affected by the fact that the judgment was recovered before the enactment of the Code. *Ryckman v. Ryckman*, 34 Hun, 235.

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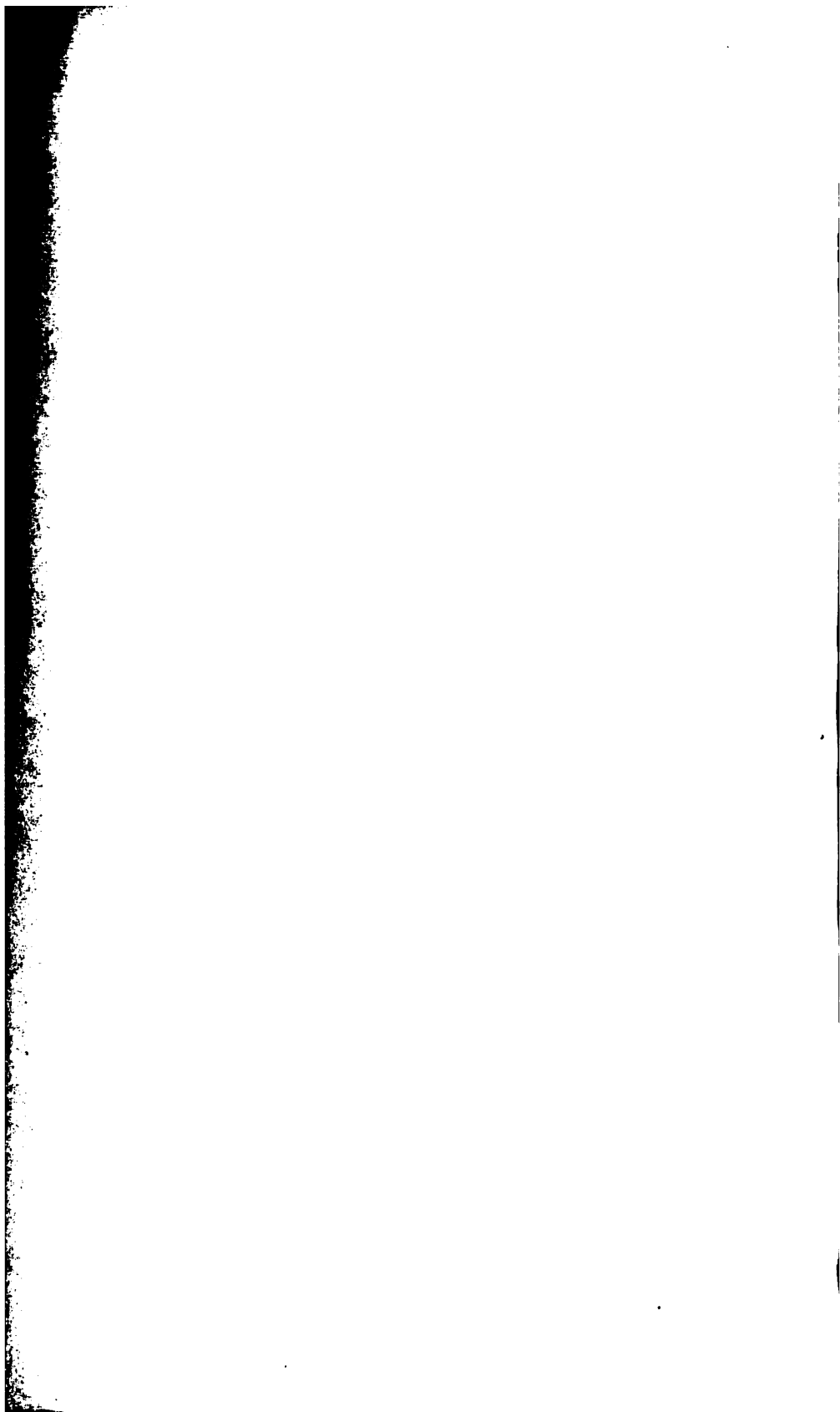
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